



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 2044 078 425 931



**HARVARD LAW SCHOOL
LIBRARY**

6d30 20

MINNESOTA REPORTS

VOL. 27

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

MINNESOTA

JULY, 1880—MAY, 1881

GEORGE B. YOUNG
REPORTER

ST. PAUL
WEST PUBLISHING CO.
1881

Copyright, 1881
by
Geo. B. Young

Rec. Jan. 23, 1882

JUDGES
OF THE
SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. JAMES GILFILLAN, CHIEF JUSTICE.
HON. JOHN M. BERRY.
HON. F. R. E. CORNELL.
HON. WILLIAM MITCHELL.¹
HON. GREENLEAF CLARK.₁

SAMUEL H. NICHOLS, Esq., CLERK.

ATTORNEYS GENERAL.

HON. CHARLES M. START.₂
HON. WILLIAM J. HAHN.³

¹By Laws 1881, c. 141, the number of Associate Justices was increased from two to four. Hon. William Mitchell, of Winona, and Hon. Greenleaf Clark, of St. Paul, were appointed by the Governor to the offices thus created, and they qualified and took their seats on March 14, 1881.

²Resigned March 11, 1881, to accept the office of Judge of the Third Judicial District.

³Appointed March 11, 1881, to fill the vacancy occasioned by the resignation of Hon. Chas. M. Start.

By Gen. St. 1878, c. 27, § 2, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on Gen. St. 1878, c. 63, § 4, the head-note in each case is prepared by the judge writing the opinion. V

The cases are reported in the order of decision, and the date of decision is indicated at the head of each case.

In the citations from the first eleven volumes of the Minnesota Reports, the page of the original edition is given, preceded by the corresponding page of the recent edition edited by Chief Justice Gilfillan.

CASES REPORTED.

	Page		Page
Abrahams <i>v.</i> Sheehan . . .	401	Brotherhood of Gethse-	
Abbott (<i>Morrison v.</i>) . . .	116	ane (County of Henne-	
Albrecht <i>v.</i> Long . . .	81	pin <i>v.</i>)	460
Allis (<i>Dodge v.</i>) . . .	376	Brown <i>v.</i> Winona & St.	
Ames <i>v.</i> Cannon River		Peter R. Co. . . .	162
M'f'g Co. . . .	245	Butler <i>v.</i> First Presbyte-	
Ames <i>v.</i> Slater. . . .	70	rian Church	355
Bailey <i>v.</i> Chandler . . .	174	Caledonia & Mississippi	
——— (<i>Terryll v.</i>) . . .	304	Ry. Co. (<i>Coe v.</i>) . . .	197
Balch (<i>Feltus v.</i>) . . .	357	Campbell <i>v.</i> Landberg .	454
Barber <i>v.</i> Evans . . .	92	——— (<i>Mason v.</i>) . . .	54
Barney <i>v.</i> Flower . . .	403	Cannady <i>v.</i> Lynch . . .	435
Barnum <i>v.</i> Gilman . . .	466	Cannon River M'f'g Co.	
Barton (<i>Molm v.</i>) . . .	530	(Ames <i>v.</i>)	245
Bass <i>v.</i> City of Shakopee	250	Carli <i>v.</i> Rhener . . .	292
Becker <i>v.</i> Dunham . . .	32	Carson (<i>Freeman v.</i>) . .	516
Bennett <i>v.</i> Kniss . . .	49	Chandler (<i>Bailey v.</i>) . .	174
Bentley (First Nat. Bank		——— <i>v.</i> De Graff . . .	208
of Rochester <i>v.</i>) . . .	87	——— (<i>Porter v.</i>) . . .	301
Berkey <i>v.</i> Judd . . .	475	Chapin (<i>Fenno v.</i>) . . .	519
Bixby <i>v.</i> Wilkinson . . .	262	Charter Oak Life Ins. Co.	
Board of Public Works of		(<i>Ricker v.</i>)	193
St. Paul (<i>State v.</i>) . . .	442	Chesterson <i>v.</i> Munson .	498
Boetcher <i>v.</i> Staples . . .	308	Chicago, Mil. & St. Paul	
Bohn (<i>Robson v.</i>) . . .	333	Ry. Co. (<i>Deakin v.</i>) . .	303
Boice <i>v.</i> Boice	371	Chicago, Mil. & St. Paul	
Braden (<i>Hoyt v.</i>) . . .	490	Ry. Co. (<i>O'Connor v.</i>) .	166
Brandup <i>v.</i> St. Paul Fire		Chicago, St. Paul & M.	
& Marine Ins. Co. . . .	393	Ry. Co. (<i>Stinson v.</i>) . .	284

(v)

	Page		Page
Chittenden v. German-American Bank . . .	143	Douglas (Cleveland Co-operative Stove Co. v.)	177
City of St. Paul (Dyer v.)	457	Dunham (Becker v.) . .	32
— v. Mullen . . .	78	Dyer v. City of St. Paul	457
— v. Smith . . .	364		
City of Shakopee (Bass v.)	250	Estelle v. Village of Lake Crystal	243
City of Winona v. Minn. Ry. Const. Co. . . .	415	Evans (Barber v.) . . .	92
Cleveland Co-operative Stove Co. v. Douglas .	177	Fahey (Seigneuret v.) . .	60
Coe v. Caledonia & Mississippi Ry. Co. . . .	197	Farley v. Kittson . . .	102
Condit (McClung v.) . .	45	Farmer (Geiser Threshing Machine Co. v.)	428
Cook v. Slocum	509	Feltus v. Balch	357
Cornell v. Smith	132	Fenno v. Chapin	519
County of Becker (Johnston v.)	64	Ferguson v. Kumler . . .	156
County of Chisago v. St. Paul & Duluth R. Co.	109	First Div. St. P. & P. R. Co. (Peterson v.) . .	218
County of Hennepin v. Brotherhood of Gethsemane	460	First Nat. Bank of Rochester v. Bentley . . .	87
County of Hennepin v. Grace	503	First Presbyterian Church (Butler v.)	355
County of McLeod (State v.)	90	Fleming v. St. Paul & Duluth R. Co.	111
County of Mower v. Williams	25	Florer (Goodrich v.) . .	97
County of Ramsey v. Stees	14	— (O'Mulcahy v.) . . .	449
		Flower (Barney v.) . . .	403
Davis v. Smith	390	Frank v. Irgens	43
Dawson v. Girard Life Ins. Co.	411	Freeman v. Carson . . .	516
Deakin v. Chicago, Mil. & St. Paul. Ry. Co. . .	303	Freidheim (Howe v.) . .	294
De Graff (Chandler v.) .	208	Frost (Williams v.) . . .	255
— (Western R. Co. v.)	1	Funk (State v.)	318
Desnoyer v. Jordan . .	295		
Dingman v. Raymond .	507	Galvin (State v.)	16
Dodge v. Allis	376	Gates (State v.)	52
Donnelly (Pettingill v.)	332	Geiser Threshing Machine Co. v. Farmer	428
		Gellatly v. Odd Fellows' Mut. Benefit Society	215
		German-American Bank (Chittenden v.) . . .	143
		Gieseke (Wells v.) . . .	478

	Page		Page
Gillitt v. Truax . . .	528	Johnston v. County of	
Gilman (Barnum v.) . .	466	Becker	64
Girard Life Ins. Co. (Daw-		Jones v. Radatz . . .	240
son v.)	411	— (Sumner v.) . . .	312
Gjerness v. Mathews . .	320	Jordan (Desnoyer v.) .	295
Goodrich v. Florer . . .	97	Jorgenson (Pinney v.) .	26
Grace (County of Henne-		Judd (Berkey v.) . . .	475
pin v.)	503		
Gunnaldson v. Nyhus . .	440	Kaser v. Haas	406
		Keller v. Sioux City & St.	
Haas (Kaser v.)	406	P. R. Co.	178
Hall v. Southwick . . .	234	Kelly v. Seely	385
Hally (Minneapolis Har-		Kittson (Farley v.) . .	102
vester Works v.) . . .	495	Kniss (Bennett v.) . . .	49
Harrington v. Town of		Kumler (Ferguson v.) .	156
Plainview	224	Landberg (Campbell v.)	454
Hinds (Sheehy v.) . . .	259	Lankton v. Stewart . . .	346
Hoffman v. Parsons . . .	236	Leland (Morton v.) . . .	35
Holcombe v. Johnson . .	353	Long (Albrecht v.) . . .	81
Hooper v. Webb	485	Loomis (State v.) . . .	521
Horning v. Sweet	277	Lyman v. Rasmussen . .	384
Howe v. Freidheim . . .	294	Lynch (Cannady v.) . .	435
Hoyt v. Braden	490	Lytle (Smith v.)	184
Hughes v. Winona & St.			
Peter R. Co.	137	McAbe v. Thompson . . .	134
Huot v. McGovern . . .	84	McClung v. Condit . . .	45
— v. Wise	68	McGovern (Huot v.) . . .	84
Hyde (Johnson v.) . . .	52	McPhee v. Staples . . .	307
— (State v.)	153	Mason v. Campbell . . .	54
— (Tyrer v.)	51	Mathews (Gjerness v.) .	320
		Merchant v. Woods . . .	396
Irgens (Frank v.)	43	Messenger (State v.) . .	119
Isaacson v. Minn. & St.		Miles v. Wann	56
Louis Ry. Co.	463	Minneapolis & St. Louis	
		Ry. Co. (Isaacson v.) .	463
Jelineck (Willis v.) . . .	18	Minneapolis & St. Louis	
Jenicke v. Minn. & St.		Ry. Co. (Jenicke v.) .	359
Louis Ry. Co.	359	Minneapolis & St. Louis	
Johnson (Holcombe v.) .	353	Ry. Co. (Schubert v.) .	360
— v. Hyde	52	Minneapolis Harvester	
— (Sollund v.)	455	Works v. Hally	495

	Page		Page
Minnesota Ry. Const. Co.		Robson v. Bohn	333
(City of Winona v.) . . .	415	Roles v. Mintzer	81
Mintzer (Roles v.) . . .	31	Ruhnke (State v.) . . .	309
Molm v. Barton	530	Ryan v. School-District	
Montgomery (Stevens v.)	108	No. 13	433
Morey v. Morey	265	St. Paul & Duluth R. Co.	
Morrison v. Abbott . . .	116	(County of Chisago v.)	109
Morton v. Leland . . .	35	St. Paul & Duluth R. Co.	
Mullen (City of St. Paul v.)	78	(Fleming v.)	111
Mullin (Sheffield v.) . . .	374	St. Paul & Duluth R. Co.	
Munson (Chesterson v.) .	498	(Walsh v.)	367
Nyhus (Gunnaldson v.) .	440	St. Paul Fire & Marine	
O'Connor v. Chicago, M. &		Ins. Co. (Brandup v.)	393
St. P. Ry. Co.	166	St. Paul & S. C. R. Co.	
Odd Fellows' Mut. Benefit		(Winona & St. P. R. Co.	
Society (Gellatly v.) . . .	215	v.)	128
Officer v. Simpson . . .	147	School-District No. 13	
O'Mulcahy v. Florer . . .	449	(Ryan v.)	433
Parsons (Hoffman v.) . . .	236	Schubert v. Minneapolis &	
Penfield v. Wheeler . . .	358	St. L. Ry. Co.	360
Penner (State v.)	269	Schuster v. Town of Le-	
Peterson v. First Div. St.		mond	253
P. & P. R. Co.	218	Sears v. Wempner	351
Peterson (Solberg v.) . . .	431	Seely (Kelly v.)	385
Pettingill v. Donnelly . . .	332	Seigneuret v. Fahey . . .	60
Pickett v. Pickett	299	Sennett v. Shehan	328
Pinney v. Jorgenson . . .	26	Sharp (State v.)	38
Pinney's Will	280	Sheehan (Abrahams v.) .	401
Pomeroy (Williams v.) . . .	85	Sheehy v. Hinds	259
Porter v. Chandler	301	Sheffield v. Mullin . . .	374
Radatz (Jones v.)	240	Shehan (Sennett v.) . . .	328
Rasmussen (Lyman v.) . . .	384	Simpson (Officer v.) . . .	147
Raymond (Dingman v.) . . .	507	Sioux City & St. P. R. Co.	
Reed (State v.)	458	(Keller v.)	178
Rhener (Carli v.)	292	Slater (Ames v.)	70
Ricker v. Charter Oak Life		Slocum (Cook v.)	509
Ins. Co.	193	Smith (City of St. Paul v.)	364
Riebe (State v.)	315	— (Cornell v.)	132
		— (Davis v.)	390
		— v. Lytle	184
		Solberg v. Peterson . . .	431

	Page		Page
Sollund v. Johnson . . .	455	Truax (Gillitt v.) . . .	528
Southwick (Hall v.) . .	234	Tyrer v. Hyde	51
Standish v. Vosberg . .	175		
Staples (Boetcher v.) . .	308	Village of Lake Crystal	
—— (McPhee v.) . . .	307	(Estelle v.)	243
State v. Board of Public		Vosberg (Standish v.) .	175
Works of St. Paul . . .	442		
State v. County of McLeod	90	Walsh v. St. Paul & Du-	
—— v. Funk	318	luth R. Co.	367
—— v. Galvin	16	Wann (Miles v.) . . .	56
—— v. Gates	52	Ward (Watson v.) . . .	29
—— v. Hyde	153	Watson v. Ward	29
—— v. Loomis	521	Webb (Hooper v.) . . .	485
—— v. Messenger . . .	119	Weld v. Weld	330
—— v. Penner	269	Wells v. Gieseke . . .	478
—— v. Reed	458	Wempner (Sears v.) . .	351
—— v. Riebe	315	Western R. Co. v. DeGraff	1
—— v. Ruhnke	309	Wheaton v. Wheeler . .	464
—— v. Sharp	38	Wheeler (Penfield v.) .	358
—— v. Wheeler	76	—— (State v.)	76
Stees (County of Ramsey		—— (Wheaton v.) . . .	464
v.)	14	Wilkinson (Bixby v.) .	262
Stevens v. Montgomery .	108	Williams (County of Mow-	
Stewart (Lankton v.) . .	346	er v.)	25
Stinson v. Chicago, St. P.		Williams v. Frost . . .	255
& M. Ry. Co.	284	—— v. Pomeroy . . .	85
Sumner v. Jones	312	Willis v. Jelineck . . .	18
Sutton v. Wood	362	Winona & St. Peter R. Co.	
Sweet (Horning v.) . . .	277	(Brown v.)	162
		Winona & St. Peter R. Co.	
Terryll v. Bailey	304	(Hughes v.)	137
Thompson (McAbe v.) . .	134	Winona & St. Peter R. Co.	
Town of Lemond (Schus-		v. St. Paul & S. C. R. Co.	128
ter v.)	253	Wise (Huot v.)	68
Town of Plainview (Har-		Wood (Sutton v.) . . .	362
rington v.)	224	Woods (Merchant v.) . .	396

CASES CITED BY THE COURT.

	Page		Page
Abbott v. Dexter, 6 Cush. 108,	404	Browning v. Handford, 7 Hill,	120,
— v. Draper, 4 Denio, 51,	329		274
Adams v. Brackett, 5 Met. 280,	196	Bruggerman v. True, 25 Minn.	123,
Agassiz v. London Tramway Co.,	170		174
Fisher's Ann. Dig. 1873, p. 246,	82	Butler v. White, 25 Minn. 432,	363
Albrecht v. Long, 25 Minn. 163,	127	Caldwell v. Kennison, 4 Minn.	248
Andrews v. Lyon, 11 Allen, 349,	202	23, (47,)	511
Anonymous, 12 Mod. 249,	9	Carpenter v. City of St. Paul, 23	471
Arnold v. Nye, 23 Mich. 286,	274	Minn. 232,	289
Baker v. Gee, 1 Wall. 333,	392	Carson v. McPhetridge, 15 Ind.	414
— v. McDuffie, 23 Wend. 289,	110	327,	211
Bank of Commerce v. Selden, 3	455	Central Pacific R. Co. v. Pear-	288
Minn. 99, (155,)	171	son, 35 Cal. 247,	424
Barker v. Keith, 11 Minn. 37,	414	Chance v. McWhorter, 26 Ga.	423
(65,)	288	315,	424
Barron v. Paulson, 22 Minn. 36,	401	Chandler v. De Graff, 22 Minn.	244
Bass v. Chicago & N. W. Ry.	266	471,	169
Co., 42 Wis. 654,	123	— v. Jamaica Pond Aqueduct	492
Bayley v. Greenleaf, 7 Wheat.	165	Co., 122 Mass. 305,	261
46,	262	City of Winona v. Cowdrey, 93	363
Benham v. Dunbar, 103 Mass.	274	U. S. 612,	472
365,	293	— v. Minn. Ry. Const. Co., 25	363
Bennett v. Healey, 6 Minn. 158,	293	Minn. 328,	472
(240,)	370	— v. Thompson, 24 Minn. 199,	74
Berkey v. Judd, 22 Minn. 287,	171	Cleveland v. City of St. Paul, 18	173
63, 304	171	Minn. 279,	295,
Bissell v. Briggs, 9 Mass. 462,	171	Cleveland, Columbus, etc., R.	110
Bloodgood v. Mohawk & H. R.	262	Co. v. Mara, 26 Ohio St. 185,	170,
Co., 18 Wend. 9,	262	Coe v. Caledonia & Mississippi	170,
Boardman v. Halliday, 10 Paige,	262	Ry. Co., 27 Minn. 197,	170,
223,	262	Cogel v. Raph, 24 Minn. 194,	170,
Brooks v. Bruyn, 35 Ill. 392,	262	Coleman v. Pearce, 26 Minn.	170,
Brothers v. Cartter, 52 Mo. 372,	262	123,	170,
Broughton v. Sherman, 21 Minn.	262	Com. v. Cluley, 56 Pa. St. 270,	170,
431,	262	Combs v. Cooper, 5 Minn. 200,	170,
Brown v. Davis, 9 N. H. 76,	262	(254,)	170,
— v. Lunt, 37 Me. 423,	262	Commercial Bank of Ky. v.	170,
— v. Winona & St. P. R. Co.	262	Slater, 21 Minn. 172,	170,
27 Minn. 162,	262	Commonwealth v. Hackett, 2	170,
Brownell v. Pacific R. Co., 47	262	Allen, 136,	170,
Mo. 239,	262	Com'rs of Aitkin Co. v. Mor-	170,
Brownfield v. Dyer, 7 Bush, 505,	262	rison, 25 Minn. 295,	170,

	Page		Page
County Treas'r of Mille Lacs		Gorman v. Supervisors, etc., 20	
Co. v. Dike, 20 Minn. 363,	5	Minn. 392,	254
Crawford v. Dunbar, 52 Cal. 36,	472	Gray v. Larrimore, 2 Abb. (U.	
Curry v. Chicago & N. W. Ry.		S.) 542,	269
Co., 43 Wis. 665,	115	Gregg v. Bostwick, 33 Cal. 220,	159
		Green v. Fall River, 113 Mass.	
		262,	288
Daniels v. Smith, 4 Minn. 117,		Green's Adm'r v. Creighton, 23	
(172,)	176	How. 90,	74
Davis v. Mayor, etc., of New		Greve v. Coffin, 14 Minn. 345,	281
York, 1 Duer, 451,	252	Grimes v. Bryne, 2 Minn. 72,	
Devine v. St. Paul & S. C. R.		(89,)	135
Co., 22 Minn. 8,	113	Gulick v. New, 14 Ind. 93,	471
Dive v. Maningham, Plowden,			
60,	127	Hahn v. Kelly, 34 Cal. 391,	267
Dodge v. Minn. Plastic State		Hanover R. Co. v. Coyle, 55 Pa.	
Roofing Co., 14 Minn. 49,	527	St. 396,	172, 173
Donnelly v. Simonton, 7 Minn.		Harriman v. Stowe, 57 Mo. 93,	171
110, (167,)	176	Harris v. Murray, 28 N. Y. 574,	192
Dorman v. Ames, 12 Minn. 451,	247	Hartford v. Palmer, 16 John.	
Drentzer v. Bell, 11 Wis. 119,	117	142,	438
Drymala v. Thompson, 26 Minn.		Heath v. Tenney, 3 Gray, 380,	404
40,	141	Eicks v. Stone, 13 Minn. 434,	455
		Hinds v. American Express Co.,	
East Pennsylvania Railroad v.		24 Minn. 95,	30
Heister, 40 Pa. St. 53,	289	Hodges v. Eddy, 38 Vt. 327,	63
Edgerton v. Bird, 6 Wis. 527	63	Holmes v. Campbell, 13 Minn. 66,	110
		Horton v. Maffitt, 14 Minn. 289,	
Falkner v. Guild, 10 Wis. 563,	267	176, 193	
Ferguson v. Kumler, 25 Minn.		Humboldt Township v. Long, 92	
183,	158	U. S. 642,	226
Fetz v. Clark, 7 Minn. 159, (217,)	59	Hutchinson v. Chicago & N. W.	
Fink v. Fink, 8 Iowa, 312,	404	Ry. Co., 41 Wis. 541,	264
First Nat. Bank v. Rogers, 15			
Minn. 381,	22	In re Boyle, 9 Wis. 264,	293
Fish v. Collens, 21 La. 289,	472	In re Corliiss, 11 R. I. 638,	472
Forrer v. Klocke, 10 Neb. 373,	191	Ingersoll v. Randall, 14 Minn.	
Foster v. Minn. Central Ry. Co.,		400,	441
14 Minn. 360,	163	Ingram v. Foot, 12 Mod. 611,	127
Fowler v. Johnson, 26 Minn.		Insurance Company v. Mosley, 8	
338,	175	Wall. 397,	171, 173
Fox v. Stevens, 13 Minn. 272,	308		
Franklin Mining Co. v. Pratt,		Jacobus v. St. Paul & Chicago	
101 Mass. 359,	404	Ry. Co., 20 Minn. 125,	114
		James v. Cornish, 25 Minn. 305,	226
Gaar v. Louisville Banking Co.,		Jeffries v. Sherburn, 21 Ind. 112,	192
11 Bush, 180,	242	Jenness v. School-district, 12	
Gaines v. Clark, 23 Minn. 64,	405	Minn. 448,	434
Garrett v. Mannheimer, 24		Jones v. Town, 26 Minn. 172,	174
Minn. 193,	63		
Gerke v. Purcell, 25 Ohio, 229,	505	Kern v. Chalfant, 7 Minn. 393,	
Gilbert v. Thompson, 14 Minn.		(487,)	178, 483
544,	439	Kumler v. Ferguson, 7 Minn.	
Gillam v. Sioux City & St. P. R.		351, (442,)	32
Co., 26 Minn. 268,	114		
Goodman v. Simonds, 20 How.		La Crosse & Minn. Packet Co.	
343,	89	v. Robertson, 13 Minn. 291,	35

	Page		Page
Landrum v. Knowles, 22 N. J. Eq. 594,	196	Palmer v. Bates, 22 Minn. 532,	398
Langford v. Com'rs of Ramsey Co., 16 Minn. 375,	125	Parish v. Wheeler, 22 N. Y. 494,	35
Lehmick v. St. Paul, S. & T. F. R. Co., 19 Minn. 464,	289	Payne v. Hook, 7 Wall. 425,	74
Leonard v. Warriner, 20 Wis. 41,	402	Pease v. Rush, 2 Minn. 89, (107.)	523
Lester v. Jewett, 11 N. Y. 453,	329	Pence v. Arbuckle, 22 Minn. 417,	363
Locke v. First Div., etc., R. Co., 15 Minn. 350,	168	Pennsylvania R. Co. v. Books, 57 Pa. St. 339,	170
London v. Lynn, 1 H. Bl. 206,	252	People v. Clute, 50 N. Y. 451,	470
Luby v. Hudson River R. Co., 17 N. Y. 131,	170, 173	— v. Cook, 8 N. Y. 67,	293
Lund v. Tyngsborough, 9 Cush. 36,	172	— v. Moleter, 23 Mich. 341,	472
Lyman v. Rasmussen, 27 Minn. 384,	466	— v. Peabody, 6 Abb. Pr. 228,	293
Lynd v. Picket, 7 Minn. 128, (184.)	308	— v. Pease, 30 Barb. 588,	39
McCarthy v. Niskern, 23 Minn. 90,	308	— v. Rathbun, 21 Wend. 509,	248
McLean v. Burbank, 11 Minn. 189, (277.)	114	— v. Vance, 12 Wend. 78,	248
McNara v. Chicago & N. W. Ry. Co., 41 Wis. 69,	264	— v. White, 14 Wend. 111,	248
Madland v. Benland, 24 Minn. 372,	452	Phelps v. People, 72 N. Y. 334,	527
Malleable Iron Works v. Phoenix Ins. Co., 25 Conn. 465,	395	Pierce v. Andrews, 6 Cush. 4,	363
Marvin v. Dutcher, 26 Minn. 391,	281	Piper v. Johnston, 12 Minn. 60,	118
Matter of the Application of the Senate, 10 Minn. 56, (78.)	5	Price v. Baker, 41 Ind. 572,	471
Michigan Central R. Co. v. Carrow, 73 Ill. 348,	170	Prindle v. Campbell, 9 Minn. 197, (212.)	262
— v. Coleman, 28 Mich. 440,	169	Queen v. Mayor, etc., of Tewkesbury, Law Rep. 3 Q. B. 629,	470
— v. Gougar, 55 Ill. 503,	169	Reed v. Pixley, 22 Minn. 540,	60
Miller v. Lamb, 22 Minn. 43,	32	Rexford v. Knight, 11 N. Y. 308,	125
Milner v. Norris, 13 Minn. 455,	518	Rice v. Austin, 19 Minn. 104,	5
Mitchell v. Van Buren, 27 N. Y. 300,	483	Robinson v. Fitchburg & Worcester R. Co., 7 Gray, 92,	169
Moliere v. Pa. Fire Ins. Co., 5 Rawle, 342,	395	Rogers v. City of St. Paul, 22 Minn. 494,	511
Morrison v. Abbott, 27 Minn. 116,	162	— v. McCauley, 22 Minn. 384,	118
Moulton v. Thompson, 26 Minn. 120,	174	Russell v. Erwin, 38 Ala. 44,	63
Nelson v. Cowing, 6 Hill, 336,	395	Rutherford v. Newman, 8 Minn. 28, (47.)	176
O'Brien v. City of St. Paul, 25 Minn. 331,	458	St. Paul & C. Ry. Co. v. Brown, 24 Minn. 517,	5
Opinion of Judges, 38 Me. 598,	472	St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75,	144
Packet Company v. Clough, 20 Wall. 528,	169	St. Peters Church v. County of Scott, 12 Minn. 395,	505
		Sanford v. Handy, 23 Wend. 260,	395
		Saunders v. Haynes, 13 Cal. 145,	472
		Schmidt v. Ludwig, 26 Minn. 85,	55
		Schwerin v. De Graff, 21 Minn. 354,	32
		Seaton v. Scovill, 18 Kan. 433,	242
		Seeman v. Feeney, 19 Minn. 79,	308
		Settlemier v. Sullivan, 97 U. S. 444,	267, 269
		Shattuck v. Stoneham Branch Railroad, 6 Allen, 115,	288
		Sheehy v. Hinds, 27 Minn. 259,	452
		Shepard v. Rhodes, 7 R. I. 470,	55

	Page		Page
Simpson v. Cook, 24 Minn. 180,	151	Tinkcom v. Lewis, 21 Minn. 132,	20
Sisson v. Cleveland & T. R. Co.,		Toledo & W. R. Co. v. Goddard,	
14 Mich. 489,	171	25 Ind. 185,	171
Spencer v. Geissman, 37 Cal. 96,	410	Town v. Washburn, 14 Minn.	
Sperry v. Horr, 32 Iowa, 184,	242	268,	59
Stafford v. Bacon, 1 Hill, 532,	55	Town of Bennington v. Park, 50	
State v. Armstrong, 4 Minn. 251,		Vt. 178,	233
(335,)	300	Town of Duaneburgh v. Jen-	
— v. Bliss, 21 Minn. 458,	30	kings, 57 N. Y. 177,	233
— v. Boylson, 3 Minn. 325,		Town of Plymouth v. Painter,	
(438,)	312	17 Conn. 685.	293
— v. Brown, 12 Minn. 538,	293	Township of East Oakland v.	
— v. Cron, 23 Minn. 140,	319	Skinner, 94 U. S. 255,	226
— v. Fleckenstein, 26 Minn.			
177,	77	Union Bank v. Jolly's Adm'rs,	
— v. Gastinel, 20 La. 114,	472	18 How. 503,	74
— v. Giles, 1 Chandler, (Wis.)			
112; 2 Pinney, 166,	472	Vaughan v. O'Brien, 57 Barb.	
— v. Hanley, 25 Minn. 429,	319	491,	306
— v. Kinsella, 14 Minn. 524,	238		
— v. Pfeifer, 26 Minn. 175,	77	Ward v. Huhn, 16 Minn. 159,	409
— v. Ramsey Co. Probate Court,		Warren v. Fish, 7 Minn. 347,	
25 Minn. 22	414	(432,)	176
— v. Schmail, 25 Minn. 370,	77	— v. Whitney, 24 Me. 561.	55
— v. Smith, 14 Wis. 497,	472	Warsop v. City of Hastings, 22	
— v. Swearingen, 12 Ga. 23,	472	Minn. 442,	494
— v. Town of Lime, 23 Minn.		Webb v. Robinson, 14 Ga. 216,	414
521,	206	Weller v. Eames, 15 Minn. 461,	235
— v. Vt. Central R. Co., 28 Vt.		Whitaker v. Culver, 8 Minn,	
583,	527	103, (133,)	363
Steele v. Fish, 2 Minn. 129,		— v. —, 6 Minn. 203, (297,)	363
(153,)	93	White v. French, 15 Gray, 339,	295
Stein v. La Dow, 13 Minn. 412,	257	Whittier v. Chicago, M. & St. P.	
Stocking v. Hanson, 22 Minn.		Ry. Co., 24 Minn. 394,	115, 361
542,	477	— v. —, 26 Minn. 44,	115
Sublett v. Bedwell, 47 Miss. 266,	472	Wilcox v. Smith, 5 Wend. 231,	293
Sumner v. Sawtelle, 8 Minn. 272,		Wilder v. Haughey, 21 Minn.	
(309,)	118	101,	161, 408
Suydam v. Broadnax, 14 Pet. 67,	74	Williams v. Lash, 8 Minn. 441,	
		(496,)	20, 23
Taylor v. Burgess, 26 Minn. 547.	134	— v. Porter, 41 Wis. 422,	264
The Succession of Kegler, 23 La.		— v. Stewart, 25 Minn. 516,	350
455,	195	Witherell v. Milwaukee v. St. P.	
Third Nat. Bank v. Armstrong,		Ry. Co., 24 Minn. 410,	168
25 Minn. 530,	498	Woolfolk v. Bird, 22 Minn.	
Thompson v. Myrick, 24 Minn. 4,	430	341,	133
Tillotson v. Millard, 7 Minn. 419,		Worley v. Naylor, 6 Minn. 123,	
(513,)	159	(192,)	202

PROCEEDINGS

IN MEMORY OF

Associate Justice, F. R. E. CORNELL.

The Honorable Francis R. E. Cornell, an associate justice of the supreme court of Minnesota, died at his home in Minneapolis, on the twenty-third day of May, 1881.

Judge Cornell was born at Coventry, in Chenango county, New York, on the seventeenth of November, 1821. He was graduated from Union College in 1842, was admitted to the bar in the supreme court at Albany in 1846, and began the practice of law at Addison, Steuben county, where he remained until 1854. He was a member of the state senate of New York for 1852 and 1853. In the year 1854 he became a citizen of Minnesota, making his home at Minneapolis, where he resided until his death. He was a member of the state legislature in the years 1861, 1862, and 1865, and attorney-general for six years, from January 10, 1868, to January 9, 1874. In November, 1874, he was elected associate justice of the supreme court, and qualified and took his seat on the eleventh day of January, 1875.

On the tenth day of June, 1881, at a fully attended meeting of the bar of the state, a memorial resolution was adopted, and Hon. Gordon E. Cole, chairman of the meeting, was instructed to present the memorial to the supreme court.

On the same day Mr. Cole presented to the supreme court then in session the memorial of the bar, and moved that it be entered in the records of the court.

(xv)

MEMORIAL.

We, the members of the bar of the state of Minnesota, deem it appropriate that we should place upon record an expression of our sense of the great loss to our state and its judiciary, and to our profession, caused by the death of Hon. Francis R. E. Cornell, one of the justices of the supreme court of our state, which occurred on the twenty-third day of May last.

More than twenty-five years of his vigorous manhood were passed among us in the constant and successful practice of our profession. Endowed with quickness of perception and clearness of judgment to a degree rarely united in the same person, with his thorough training and close application, he excelled in all branches of the profession, and stood foremost at the bar of the state, his career being marked no less by eminent ability and strict integrity, than by that uniform kindness and courtesy toward his brethren which won for him the especial regard of the younger members of the bar, to whom he was the model of professional excellence.

His fitness for the highest professional honors was recognized by his brethren at the bar, and by the people of the state. After discharging the duties of attorney-general for repeated terms with signal ability, he was elevated to the bench of the supreme court, and has left a judicial record without blemish and above criticism, which will remain an imperishable testimony to his learning and ability after his fame at the bar shall have faded in the shadows of tradition. Deeply deploring our loss, which has taken from our state one of its most gifted and estimable citizens, from the bench one of the ablest of justices, and from our profession a brother loved and revered by us all, we can contemplate with satisfaction his useful and blameless life, and rejoice that so much of him is left to us in the records of the state and of the supreme court; and we respectfully ask that this court permit this brief expression of our regard for the memory of our honored brother to be entered upon its records.

Mr. Cole then addressed the court as follows :

May it please your Honors :

In presenting this memorial it will perhaps be expected that I accompany it with some comments upon the life and character of Judge Cornell. I might perhaps have made careful preparation, and culled some flowers of rhetoric to strew upon his grave; but I cannot do it; I leave that for those who knew him less and loved him less. I must speak from the heart, and rely upon the inspiration of the moment.

Nearly a quarter of a century ago I came to this city, a mere boy, to assume the discharge of the duties of the office of attorney-general, without acquaintance or friends; and the first acquaintance and friend I made was Judge Cornell. The acquaintance thus begun ripened into an intimacy and friendship, which I cherished as I never cherished other friendship, and which ceased only with his life.

My opportunities for forming a correct estimate of his character and talents I believe to have been unusual, meeting him at the bar, first as prosecuting officer while he was engaged in the defence, afterwards, when he had become attorney-general and prosecutor, and I was employed for the defence. In later years I had the good fortune to be associated with him in a very important civil case in the federal courts, until, at the close of the litigation in the trial court, he was removed from the case by his appointment to the supreme bench. In the subsequent progress of the cause in the supreme court of the United States, he was succeeded by a gentleman who then stood and still stands at the head of the bar of the country, with a reputation and fame only circumscribed by the territorial boundaries of the nation. The opportunity of measuring Judge Cornell's powers by contrast with those of the highest I believe I did not abuse. I do not think that my judgment was swayed by personal friendship. At any rate it was deliberately formed, and has been since carefully reviewed, and I then thought and still think that in every attribute which contributes to form the character of a great lawyer, Judge Cornell was the peer of his successor, and that a reversal of opportunities would have produced a corresponding reversal of station, fame and reputation.

The salient feature of Judge Cornell's character as a lawyer was the unerring certainty with which his mind glided from premise to conclusion. I have often had occasion to note and to admire the rapidity with which, with almost the precision of intuition, he would

arrive at the correct solution of a difficult legal problem, then first submitted to his attention; the comprehensive glance with which he would instantly sweep the entire subject, and take it in with all its qualifications and limitations. While his high character and standing in the state made him the constant recipient of civil honors, and in the politics of the state, as well as at the bar, his position was always conspicuous, yet a marked characteristic of the man was his innate modesty. In self-conceit he seemed absolutely wanting, and yet no man that I ever knew had a more constant and abiding confidence in himself.

No man who has ever embellished and adorned the bench or official position in this state was ever more conspicuously distinguished for the perfect purity of his public and private character than our lamented friend.

He was not a mere lawyer, he was not a man of the cloister and the office. In all the great enterprises which have made the beautiful and flourishing city of Minneapolis what it is, he bore a prominent part. In the politics of the state he was a leader, and, although for a quarter of a century participating in the always earnest and often bitter contests which politics engender, and often a candidate and elected to political office, yet at those periods when the character of no man is secure from the envenomed shafts of political enemies, if there is a flaw in his armor through which the spear of an opponent can pierce, nor ever, during the quarter of a century during which he has lived and moved, always a prominent figure, among us, has the breath of scandal ever so much as essayed to reach him. His character and reputation have remained untarnished by a whisper of suspicion.

The uniform urbanity of his manner, the innate kindness and gentleness of his character, endeared him to all; and especially to the young neophyte, embarrassed in the intricacies of his first case before the most august tribunal of the state, and then essaying his first flight in the atmosphere of jurisprudence, his gentle manners and attentive ear carried the same ease as to the older barrister, with assured reputation, flushed with the triumphs of hundreds of forensic successes.

He has gone from among us, and has left the judicial ermine not only spotless as when he assumed it, but has left to his family the priceless legacy of an unsullied private character as a citizen and a man. The bar of this state, with uniform accord, will endorse me when I say that in him were blended, with a harmony which the faultless hand of nature seldom achieves, the attributes which make

the character of a great judge; profound legal learning, combined with the keenest accumen in its application, purity of public and private life, and the suavity of manners which marks the gentleman, producing a magnificent self-poise, and a beauty of character which is rarely permitted by the frailties of our common humanity.

Hon. Isaac Atwater then addressed the court as follows:

May it please the Court:

Having had occasion recently, at a meeting of the Hennepin County Bar Association, to render my tribute to the memory of the late Judge Cornell, I shall trespass but a few moments on your time to-day; and the more especially, inasmuch as I observe the most of those present have long known the judge professionally, and can render a more eloquent tribute to his eminent ability than I could hope to do. It seems peculiarly fitting that one who has so long been a distinguished member of the bar and bench of the state, and who has also adorned other important offices in the gift of the people, should not be permitted to pass away without some public recognition on our part of his merits. It is due, not less to the living than the dead, that this should be done.

Young as we are as a state, the profession is not yet so affluent in distinguished names, that we can afford to forget the well-earned fame of any one. And shut out as we are, by the nature of our profession, from what are usually considered the highest prizes of life, there is the more reason that we should jealously guard the reputation fairly earned by any one of our number, in the strict practice of his profession. The law is a jealous mistress, and excludes her votaries from the rewards obtained by our merchant princes and railroad magnates. But such as she has are better worth effort to the true lawyer than all others; and it should be ours to see that, when once earned, they lose none of their value to the living.

But on this occasion, standing as we might say almost in the shadow of death, I find my mind dwelling on the qualities of the deceased which distinguished him as a man, a neighbor and friend, rather than on his eminent abilities as a lawyer. It was my privilege to know him somewhat intimately for more than twenty-five years. And I do not overstate when I say that for a high, delicate sense of honor, unswerving integrity, and a conscientious desire to discharge with scrupulous fidelity every trust committed to him, I have never known him surpassed.

But there was more than this. He was ever ready to assist his

neighbors, and especially the younger members of the profession, with his valuable counsel and pecuniary means, so far as he was able. And I was forcibly struck, at the meeting of the association to which I have referred, at the number of young lawyers, who bore feeling and earnest testimony to this trait in his character. And herein he has left an example which, I am sure, we should all do well to heed and follow. We are too apt to become so wholly absorbed in the study and practice of our profession that we often forget our duties, to the younger members thereof—forget those kindnesses and amenities, which perhaps cost little, but are of more value to the recipients than we are wont to think. It may not happen to any of us to attain that eminence in the profession which it was the rare fortune of our deceased friend to reach; for that was largely due to natural gifts which few possess. But in the practice of those moral virtues which adorned his life, and the full development of which is largely a matter of cultivation, we may reasonably hope to approach more nearly the degree of excellence which he attained. And at the last supreme hour, if I mistake not, success in such an effort will give, in the retrospect, more satisfaction than the highest professional honors due to intellectual effort alone. For we must not forget that—

“Only the actions of the just
Smell sweet and blossom in the dust.”

Hon. William Lochren then addressed the court as follows:

May it please your Honors:

It is difficult, in the brief time that can be taken at such a meeting, to say anything at all commensurate with what is fitting, or to what is felt by every one respecting the loss of such a man as Judge Cornell.

I was with him, at the bar of our county, since my coming to Minnesota, twenty-five years ago; have been frequently associated with him, and oftener opposed to him, in the trial of causes, and came to know him intimately. In my judgment he was the ablest lawyer who has ever practised at that bar, and second to none in the state. He excelled in every branch of the profession—equally as a counsellor, as a pleader, in the examination of witnesses, as an advocate before juries, and in the argument of questions of law to courts. It is seldom that one man possesses such varied ability; and whenever it

occurs in our profession, it cannot fail to place the possessor in the foremost rank.

He loved his profession, and its work; and never permitted anything to divert or withdraw him from it. Trained to it from youth, he was familiar with the underlying principles of jurisprudence; and, with his natural powers of perception and accurate judgment, he seemed to reach correct conclusions with the rapidity of intuition. But he never relied too much upon his natural powers, and was familiar with leading authors and decisions, to which he could refer with readiness whenever necessary to enforce his arguments.

A noted characteristic was his unfailing courtesy and consideration for others, especially his brethren at the bar. He was always ready to assist and encourage young men starting in the profession; and many such will gratefully remember his acts of professional kindness and friendly assistance.

Although his practice was large, he seemed to work more for love of his profession than for gain; and was proverbially careless about securing compensation for his labor. Without being a politician, in the ordinary sense of that term, he took a lively interest in everything affecting the material prosperity of the state, and of the city in which he lived; and on such matters his counsel was always sought, and his influence great.

Reaching at last the goal of a laudable professional ambition—a seat upon the bench of this honored court,—I shall not speak of how well he performed the duties of that high station. That is too well known and recent to call for more than reference. Had he lived beyond his term of office, nearly closed at the time of his death, he would have been chosen, without opposition, to continue in the place for which all felt he was so well fitted. But the judicial honors, by him worn so worthily, have been laid down with his life. His labors are ended, and our brief testimony to his worth closes the record.

The Honorable R. R. Nelson, Judge of the United States District Court for Minnesota, then addressed the court as follows:

May it please the Court:

I desire, as a member of the legal profession, a native of the same state, to add my tribute of respect to the memory of the deceased. I was not intimately acquainted with Justice Cornell. Others, his coworkers and associates in the profession, who learned by social

intimacy to appreciate the man, have dwelt upon his excellent qualities of head and heart. My estimation of Judge Cornell is derived from a careful examination of his opinions, emanating from him in the discharge of public duties, and I can justly say no counsellor or judge was influenced by purer motives or surrounded by a higher moral atmosphere. His opinions show thorough education as well as cultivated literary taste. He was learned in the law, which he administered wisely, and thus won confidence and esteem.

The example of such a life should not be lost to the community, and the resolutions presented express the unanimous opinion of the legal profession.

General John B. Sanborn then addressed the court as follows:

May it please your Honors:

It was my purpose to do honor to the memory of the illustrious dead by sympathy, silence, and considerate attention to the words of eulogy uttered by others, possibly more intimately acquainted with him as a neighbor, friend, or relative than myself. But the sentiments already expressed bring so vividly to my mind the scenes and friends of the past, the important and great services rendered by the deceased, his faithfulness in all positions and under all circumstances, his wonderful mental acuteness and great legal attainments, that I cannot refrain from uttering a few words of tribute to his memory on this sad occasion.

More than twenty-five years have passed away since I first met him at the bar of Hennepin county, and such was the impression made upon me at the time of his mental power and legal knowledge, that within a year, when called upon to defend, in that county, a most critical case of murder, prosecuted by the late James R. Lawrence, whose vigor and legal capacity all the old members of the bar will well remember—I mean the case of the United States against Moon,—I called Judge Cornell to my assistance. The impressions previously made by his management and argument of the civil case were deepened and strengthened by his skill and conduct of this criminal cause. He demonstrated, beyond controversy, that he was the possessor of one of the most clear, incisive and accurate legal minds. The slightest shades of difference in the facts and the legal principles governing a case were as distinct and clear to him as the widest difference is to many of our profession. With his aid in that case the accused was discharged, although the homicide was admitted and was with-

out excuse, and the alleged criminal was of sound mind upon all matters not connected with the person killed.

The conclusions then reached by me respecting the great powers and attainments of our departed friend have been retained to the day of his death. It has been my fortune often—almost every year since that time—to meet him at the bar, in political conventions, in the legislature, where we represented constituencies who considered that they had interests that were adverse; and in all positions, and at all times, he has shown himself a wise counsellor, a high-toned honorable man, a faithful and far-seeing legislator, an able lawyer who respected and adorned his profession; and even without his legal attainments he would have been a good judge. For although a good judge may be a bad man, a good man cannot be a bad judge. And this vacancy made by the death of the learned and upright judge will be hard to fill.

Be it ours to cherish his memory and emulate his example.

Hon. M. J. Severance then addressed the court as follows:

May it please the Court:

The vacant seat on your bench has convoked this assembly to-day. Its late revered occupant has crossed the ocean that has no reflux wave, his earthly duties all performed.

We are not here to-day to tender to any the cold and formal courtesies always due to the great catastrophe of death, but we are here in the interest of the living, and those who are yet to live, to pay a just and merited tribute to the life and character of one who on the forge of life wrought out an honorable and enduring fame. We do not yield this tribute for the benefit of the dead, but to excite and awaken the emulation of the living, who, hearing the applause we bestow on noble action, may take the only pathway that can justify the highest hopes of mankind.

As a lawyer, our friend possessed those natural endowments that could but give him pre-eminence in the forensic arena; and as a judge on the bench, those same endowments lifted him far above the common plane. A quick perception and a power of analysis that never lent its ear to the sophistries of ingenious debate, ever enabled him to test the soundness of any proposition presented to his mind, and to bring method out of the chaos of conflicting opinions. Add to these natural endowments an inherent love of justice, and an un-

swerving integrity, born with him and in him, and you behold Judge Cornell as a lawyer and as a judge.

Splendid original gifts, and high intellectual endowments lavishly bestowed, invoke human admiration, and give to their possessor the stately tread of a giant. But it is not on these that we bestow our highest encomiums to-day, though they rounded out the majesty of our friend's career. We instinctively turn to the social department of his life, generous with sensitive emotion, unobtrusive, but ever radiating the vernal warmth of love and kindness. Exacting in nothing, he acknowledged the mutual obligations of his race, and yielded that deference to others that forbids personal tyranny, and smothers that effusive self-assertion which so often breeds hatred and contempt. No cloud of egotism ever drew its shade across his generous mind to mildew its opening flowers. He cultivated the finer emotions of the heart, for he knew that they were the headlight that ought to gleam along the pathway of intellectual action in every walk of his earthly duty. And when his life went out, another ray of light and warmth vanished from the earth forever.

Judge Cornell was a brother in the great brotherhood of man, and ever held out his hand to the weary as he ascended the hillsides of life. He never looked back with contempt on those who had just entered with uncertain step on the long pathway over which he had passed, but he pointed to the summit illumined with hope and then with kindly counsel wooed them along.

As a man, a lawyer or judge, he never embraced the shallow fallacy of personal triumph in order to prod the feelings of others, but in every condition of life, its highest amenities furnished the rule of his action. In the spirit of love and equality he fashioned his character with all the graces of moral symmetry, so that whatever blemishes it had were easily hidden under the mantle of human infirmity. His domestic life so full of sunshine is sacred to others. I will not unroll its once bright panorama, now moist with pearly tears, the offerings of love to love. If his death left broken hearts, let them heal again under the benign radiance of a life's sunset golden with personal honor. Judge Cornell loved his home, and every night the neighboring waterfall of Saint Anthony throbbed its soft music through the trembling lattice of his window, and lulled him to earthly sleep. Now let it forever murmur the requiem of his dreamless slumber.

Other remarks were made by Messrs. Eugene M. Wilson, William M. McCluer and John M. Shaw, at the conclusion of which, Chief Justice Gilfillan, on behalf of the court, responded as follows to the addresses of the bar :

Gentlemen of the Bar :

The memorial which has been read will be entered in the minutes. It is peculiarly fit that it should be of record in the court of which Mr. Justice Cornell was a member for the last six years of his life, and in the performance of his duties in which he spent his last strength. He had in the highest degree every claim to appropriate memorials.

His career and character as a man, as a citizen, as a shaper and leader of public opinion, as a legislator, as a member of the legal profession, and finally as a judge in the court of last resort in the state, were such as call for marked public recognition, now that he is gone. Of his public services to the state at large and to the more immediate community in which he lived, the press has made honorable mention. His personal friends, those who got to know his inner life and character, have in their private discourse, as you have done, recalled and borne their testimony to his virtues as a man; virtues which made him dear to all who had the good fortune to be on terms of intimacy with him. It is for us, at this time and place, more especially to dwell upon and pay our tribute to his memory as a member of our profession, and as connected with it by his judicial station and services. Most of us, the oldest of us at any rate, knew him for many years. His position at the bar, from the first, was such that no one could be a member of the bar in the state without knowing him, either personally or by reputation. At a very early day, at the time when the bar here may be said to have been in its infancy; when, as a political community, Minnesota was about passing from the guardianship of the general government to the free condition of a self-governing state, he was already among the foremost in the profession. Who would, for the next quarter of a century, lead in its labors, contests and honors, was then, to a great extent, uncertain. But he had taken his place. Whosoever future standing might seem doubtful, his was not. He was then an acknowledged leader. His ability, learning, eloquence and force of character, already recognized, made it evident that whoever else might fall behind, he would, so long as he remained in the practice of the profession, stand in its front rank, the equal of the highest. From that time the bar steadily increased in numbers, in strength, in learning, in influence and

importance. Through all its growth his relative position in it remained the same, until he took his place upon the bench.

The mental qualities and characteristics that enabled him to maintain so high a position at the bar, eminently fitted him for the bench. The character of his mind, indeed, was more judicial than forensic. Its more appropriate field of action was the bench rather than the bar. To assure a lawyer the highest success as an advocate, his mind must be capable, in a large degree, of taking a partizan view of a cause; of adopting as its own the feelings and prejudices of the client; and of seeing and judging of the cause through the medium of such feelings and prejudices. A mind of that stamp is apt to see but one side of the case, though, to make its possessor a great advocate, it must see all of that side at once, and as by the full light of the noonday sun. One with such a mind, especially if that be its controlling characteristic, rarely, if ever, makes a great judge. Erskine, by far the greatest advocate who has spoken in the English language, was a striking instance of this. Those who, while he was at the bar, knew Judge Cornell, not intimately, who saw his sanguine, nervous temperament, the zeal with which he engaged in the trial of a cause, his instantaneous perception of the rules and principles of law governing it, and the intense force and clearness, and fervid, energetic eloquence with which he set forth and urged upon the courts those rules and principles, might be led to suppose that his was that stamp of mind. But to suppose that would have been a grave mistake. His more intimate acquaintances knew then, his career on this bench has demonstrated since, that his success at the bar was owing to other and larger intellectual attributes than the peculiar characteristic I have ascribed to the advocate. From the time of his transfer to the bench it became apparent to all that his intellect was notably liberal and comprehensive, and singularly impartial; calmly and dispassionately taking in the whole of a case, and judging it only upon those considerations which lead to a correct result. His learning in the law was great; his quickness to apprehend the true issues in a cause and the right solution of them was marvellous—more so than I ever knew in any other man; and, at the same time, his judgment was cautious and profound, his habit of investigation patient and conscientious. In his mental operations were united two characteristics not often found together—quick, intuitive perception, and careful, patient reasoning. To these was added a clear, unfailing natural sense of justice, of moral right and wrong, on the rules of which the rules and principles of law are mainly based. These mental traits, with an intimate knowledge of

human nature, and a generous but discriminating charity towards its failings, united in him the elements that go to make the great magistrate. In respect to the harmonious combination of these conditions, it will be long before his place on the bench will be wholly filled. To the bar and to the judiciary his loss is well nigh irreparable.

I should fail of doing justice to his memory, and to his associates' appreciation of his memory, if I omitted to mention, as you have mentioned, his uniform courtesy of manner, and the amiability and gentleness of his disposition and temper; an amiability and gentleness joined with the highest degree of manly energy. These were very marked in his intercourse with his brother lawyers and the courts, while at the bar. They were more conspicuous to us, his associates on the bench, brought, as we were, into most intimate relations with him. Two of us were with him on the bench for more than six years. During that time our intercourse with him, and knowledge of him and of his traits, both of mind and heart, were necessarily very close and intimate. In the hearing of causes, in the subsequent investigation of and consultations upon them, and the preparation and comparison of decisions and opinions, we were together day by day. Frequent conflicts of opinion have necessarily arisen, followed by earnest discussions, sometimes leaving irreconcilable differences as to how causes should be decided. But in no instance that I can recall, during all that time, did he ever let fall any discourteous, unkind or irritating expression to either of his associates; nor did any difference of opinion, or anything occurring in the discussions, ever for a moment interrupt the unvarying kindly relations between him and them. In this his forbearance was the more remarkable, because, for the latter part of the time, the disease of which he died was upon him, causing him often severe suffering, at all times harassing anxiety. That under such trying conditions he should at all times preserve even temper, and exercise towards others perfect courtesy and consideration, marks strongly the character of the man.

Gentlemen, I have endeavored briefly, I know with imperfect success, to express what his survivors on the bench think and feel in regard to our departed associate. Your eloquent and appropriate memorial shall be entered in the records of the court, there to remain as a testimony so long as those records shall be preserved.

The clerk will record the memorial in the minutes for to-day, and the court will adjourn *sine die*.

27	1
40	175
27	1
42	453

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

**WESTERN RAILROAD COMPANY OF MINNESOTA *vs.* CHARLES A.
DE GRAFF and others.**

July 12, 1880.

Independence of Executive Department.—No act done, or threatened to be done, by any member of the executive department of the state government, in his official but not in his individual capacity, can be brought under judicial control or interference by *mandamus* or injunction, whether such act proceeds from an error of judgment or misapprehension of official duty under the law.

Same.—This rule applies both to ministerial acts and those which involve the exercise of judgment and discretion, and also to acts done in the performance of every official duty, whether it arises out of the constitution or a legislative enactment.

Equity—Want of Jurisdiction as to Principal Defendant—Retention of Action as to other Defendants.—A court of equity will not retain jurisdiction of an action as to some of the defendants, against whom the plaintiff has no cause of action, but is seeking auxiliary relief only, in aid of a demand claimed against another defendant, which constitutes the groundwork of the complaint, when, from want of jurisdiction over such other defendant, it is unable to make any adjudication as to such demand, or to grant any effectual relief in respect thereto.

Legislative Grant—Conditions—Sp. Laws 1877, c. 201, construed, and its provisions *held* insufficient to authorize the plaintiff to maintain the present action as against the respondents herein, upon the allegations of the complaint.

By various acts of congress, an extensive land grant was made to the territory and state of Minnesota to aid in the construction of a line of railroad from Watab to Brainerd and a line from St. Cloud to St. Vincent, the acts providing that the lands so granted should be earned by construction of such lines, and should be exclusively applied in the construction of the lines for which they were granted, and should be subject to the disposal of the legislature for that purpose and for no other. By various acts of the legislature of the state and proceedings thereunder, those land grants became vested in the St. Paul & Pacific Railroad Company, which was required, both by the acts of congress and of the legislature, to complete each line within a time specified, under penalty of forfeiture of the lands granted for such line. That company constructed a portion of the line from St. Cloud to St. Vincent, (known as the St. Vincent Extension,) and a very small portion of the line from Watab to Brainerd, (known as the Brainerd Branch,) and in the fall of 1872 suspended the work of construction, leaving a large amount due to various contractors and subcontractors for work and material, most of which had been furnished for the St. Vincent Extension. The company not having resumed the work of construction, and the time limited for completion of the lines having long since elapsed, the legislature passed an act, approved March 1, 1877, entitled "An act to provide for the completion of the lines of railroad, commonly known as the St. Paul & Pacific Extension Lines." Sp. Laws 1877, c. 201. By this act the rights, franchises, land grant, etc., of the St. Paul & Pacific Railroad Co., appertaining to the Brainerd Branch, were declared forfeited to the state, and regranted, "upon the terms and conditions as in this act provided," to any company, organized or to be organized, which should file with the

governor a written notice of its desire and intention, under and subject to the provisions of the act, to complete, maintain and operate such uncompleted line. After providing that any such company, acting under and pursuant to the provisions of the act, should become entitled to and invested with all the rights, franchises, land and property of the St. Paul & Pacific Company, appertaining to the forfeited line, "subject however to the exceptions, limitations, terms and conditions hereinafter mentioned," the act proceeded, in section 9, (which is quoted at length in the opinion,) to set apart one-half of all the lands up to 200,000 acres which should be first acquired on account of the construction of the Brainerd Branch, and one-half of all the lands up to 400,000 acres which should be first acquired on account of that part of the uncompleted St. Vincent Extension between Crookston and St. Vincent, to be reserved and retained by the state to be used by it for the payment of the claims incurred for work and material already furnished in the construction of such lines, statements of which had been filed in the state auditor's office in accordance with previous legislation. The same section further provided that the governor, attorney general and railroad commissioner should examine into the claims so filed, and adjust and ascertain the amount owing and unpaid to each claimant, and that when such amounts should have been ascertained, and any of the lands reserved should have been conveyed by the United States to the state, such lands, or so much thereof as might be necessary, should be sold by the governor at public auction, and the net proceeds of such sales be forthwith distributed ratably, by the governor, among the claimants.

The plaintiff, having caused an examination to be made of the claims filed with the state auditor, and having learned that the claims for work and material furnished for the Brainerd Branch did not exceed \$30,000, (the remainder of the claims being for work and material for the St. Vincent Extension,) undertook the construction of the Brainerd Branch, and completed it in October, 1877, within the time prescribed by

the act of March 1, 1877, and thereby earned the lands granted to aid in its construction.

For various reasons, (set forth in the complaint,) the grant for the Brainerd Branch fell far short of the full grant of ten sections per mile, and did not exceed 300,000 acres, which were worth less than the amount of the claims allowed by the commission.

In their statement of claims allowed, bearing date March 1, 1878, the commission allowed claims to the amount of \$493,228.10, by far the largest claim being that of the defendants De Graff & Co., which was allowed at \$462,559.52. Although requested to do so, the commission made no separation or distinction between the claims for work and material for the Brainerd Branch, and those for the St. Vincent Extension, though they were requested to make such separation, and could easily have done so.

At the time of the commencement of this action, (in November, 1878,) the St. Vincent Extension being still uncompleted, the governor was proceeding to select and sell certain portions of the lands earned by the construction of the Brainerd Branch by plaintiff, and was about (as stated in the complaint) to sell one-half of all the lands so earned, to satisfy the claims allowed by the commission. Whereupon the plaintiff brought this suit, in the district court for Crow Wing county, against De Graff & Co., and various others of the claimants, and against John S. Pillsbury, governor of the state. In the complaint it set forth at length and in detail the matters of which the foregoing statement is a summary, and also alleged that the claim of De Graff & Co., as allowed, was largely in excess of the sum actually due, and that the claims of the other defendants were not properly chargeable against either of the lines, and alleged a corrupt agreement between De Graff & Co. and the persons interested in the St. Vincent Extension, as a result of which section 8 of the act of 1877 was amended in 1878 by exempting that line from its provisions. The plaintiff, in its complaint, also offered to pay all sums justly and equi-

tably due any of the claimants mentioned in the act of 1877, for work and material furnished for the Brainerd Branch.

The relief demanded is (1) that the defendant claimants come to an accounting with the plaintiff as to what if anything is due them severally and respectively for work and material furnished for the Brainerd Branch, on claims filed with the auditor; (2) that the governor be enjoined preliminarily, and until plaintiff shall have paid into court or given satisfactory security to pay the sums found due on such accounting, and be thereafter perpetually enjoined, from selling any of such lands; and (3) that the amount due each claimant for work and material furnished for the Brainerd Branch be paid out of the money deposited in court, and that thereupon such defendants be adjudged to have no claim or lien on any of such lands.

The defendants De Graff & Co. and Morris demurred to the complaint, for want of jurisdiction in the court, and for failure of the complaint to state a cause of action. The demurrers were sustained by *Stearns, J.*, and the plaintiff appealed.

John B. Sanborn, for appellant.

Gilman & Clough, for respondents.

CORNELL, J. Whether, under our constitution, any officer of the executive department of the state government can be subjected to judicial control and interference in the performance of an official duty, is a question which has been before this court in different forms and at different times for consideration and decision, and the holding has uniformly been against the existence of any such jurisdiction or power in the courts. *Matter of the Application of the Senate*, 10 Minn. 56 (78;); *Rice v. Austin*, 19 Minn. 104; *County Treasurer of Mille Lacs County v. Dike*, 20 Minn. 363; *St. Paul & Chicago Ry. Co. v. Brown*, 24 Minn. 517, 573, 574. The reasons for the holding are fully stated in *Rice v. Austin*, and *County Treasurer v. Dike*, *supra*, and need not be restated here. It rests upon the constitutional principle that each of these depart-

ments of government is entirely independent of the others, so that neither can be made amenable to any other for its action or judgment in discharging the duties imposed upon it, whatever their source or nature.

The principle applies to the performance of all official duties, whether imposed by the constitution, or by legislative enactment simply, or whether they are of a character strictly ministerial, or such as call for the exercise of discretion and judgment alone. It follows that every act done or attempted to be done by any officer of the executive department, in his official and not in his individual capacity, is shielded from all judicial interference or control, either by *mandamus* or injunction, even though such act may be founded in an error of judgment, or an entire misapprehension of official duty under the law. The acts complained of and sought to be enjoined in this action are clearly acts which the defendant Pillsbury is threatening to do in his official capacity as the governor of the state, and not as an individual. The court, therefore, as against him, can take no cognizance of this action, nor grant the preventive relief prayed for by the plaintiff. If the action is dismissed, as it must be as against this defendant, for want of any jurisdiction over the governor, whether it can still be maintained against the other defendants, who are the respondents herein, is the only question remaining for consideration and decision. To sustain it against them alone, it must appear that they have such an interest in the subject-matter of the action as makes them liable to the plaintiff in respect to the demand which constitutes the groundwork of the complaint. Story Eq. Pl. §§ 503, 513, 520, 731 and 734.

No cause of action is stated against the respondents alone. For its foundation, the action rests wholly upon the theory that, under a contract between the corporation plaintiff and the state, certain lands acquired by the latter, under a congressional grant in aid of the construction of a line of railroad from Watab to Brainerd, equitably belong to the plaintiff,

upon the payment of certain claims held by the respondents and others for partly building that line of road; and that the governor, acting in his official capacity for and on behalf of the state, is wrongfully and unlawfully about to sell and dispose of such lands in parcels, and to pass the legal title thereto, which is now vested in the state, to such parties as may become the purchasers, at public sale. Such disposition and transfer of title, it is alleged, will greatly prejudice the equitable right of the plaintiff to the lands, involve it in a multiplicity of suits, and cause irreparable loss and injury. Against this apprehended wrong this action is mainly directed, and the only cause of action stated is the alleged wrongful act of the governor by which it is threatened to be accomplished. With this act respondents are in no way connected by any allegations in the complaint. It is not pretended that they have, or claim to have, any title to, estate in, or possession of the lands; that the governor is acting in the matter under any authority derived from them, or that he is in any way subject to their control. They are powerless either to compel, or to prevent him from doing the acts complained of, which, it is alleged, he is about to do. They are, therefore, under no legal duty or liability to the plaintiff in respect thereto, and no action can be maintained against them on account of the same, or to enjoin their commission.

The accounting asked for by appellant in respect to that portion of the claims held by the respondents, which have been incurred in the construction of the Watab & Brainerd line of road, is sought solely in aid of the preventive relief of a perpetual injunction against the threatened sale and conveyance of the lands. Its object is to ascertain and determine, by a judicial decision, the amount of that portion of such claims, to the end that the appellant, by paying the same, or depositing the amount thereof in court for that purpose, may become equitably entitled to a conveyance of the legal title from the state, and to a decree restraining the sale and a transfer of the title to other parties; and this is the only ground upon

which the right to an accounting is based. If such preventive relief cannot be had, because of want of jurisdiction over the only party against whom it can be enforced, it is evident that the auxiliary relief sought will be of no avail whatever, and cannot be made effectual for any purpose.

No judgment which the court can render in this action between the plaintiff and the respondents alone can affect the legal title to the lands in question as against the state, in which such title is vested, nor as against any of its grantees, for the reason that the state is not a party to the action; and the lands themselves cannot be affected by any such judgment, for the reason that the action itself is not a proceeding *in rem*, and the property has not been subjected to the jurisdiction of the court.

In any view, therefore, the litigation which is sought to be continued and carried on between the plaintiff and the respondents alone must necessarily prove fruitless and abortive, and this alone is sufficient cause why a court of equity ought to refuse to entertain it. It follows, from these views, that the decision of the court below was correct, both in its conclusion and the ground upon which it was placed.

Conceding, however, the correctness of appellant's position, that the court erred as to the question of jurisdiction, the order it made must nevertheless be sustained, for the reason that the complaint discloses no equity or cause of action entitling the plaintiff to the relief it asks against any of the defendants. Whatever legal or equitable rights appellant may have in the premises flow entirely from the legislative act of March 1, 1877, entitled "An act to provide for the completion of the lines of railroad commonly known as the St. Paul & Pacific extension lines." Sp. Laws 1877, c. 201. These lines comprised the then uncompleted lines of road from Watab to Brainerd, and from St. Cloud, *via* Crookston, to St. Vincent, in aid of each of which congress had made a grant of lands to the state. By the first section of this act, all the franchises and grants of land appertaining to the former of

these two lines of road were declared forfeited to the state; and it was one of the purposes of the act to regrant the same to whatever company might undertake the construction of the road, under and in pursuance of its provisions. The appellant company availed itself of the privileges of the act, and has completed the road from Watab to Brainerd; and the question now for consideration concerns the rights of the company in respect to the 100,000 acres of land which are in terms reserved to the state, out of the congressional grant applicable to that line of road, by section 9 of that act. The company, in accepting the provisions of the act, and the privileges and grants it conferred, took them expressly "subject to the exceptions, limitations, terms and conditions therein mentioned." (Section 7.) Whether, in disposing of the congressional land grant applicable to this line of road anew, the state, as against the United States, had any authority to prescribe these "exceptions, limitations, terms and conditions," or whether they were at variance with the purposes and terms of the grant from congress, are questions that need not be considered, as the appellant company is not in a position to raise any questions of that character. No one but the United States can complain that the conditions subsequent annexed to the grant to the state have not been complied with, or have been violated. *Baker v. Gee*, 1 Wall. 333. As against the appellant, the state, in turning over the grant to it, could rightfully impose whatever burdens or conditions, or make any reservations, it saw fit, and for any purposes satisfactory to the legislature.

Section 9 of the act enacts as follows:

"One-half of all the land up to 200,000 acres in quantity, which shall be first acquired on account of the construction of the present uncompleted line of railroad from Watab to Brainerd, or any part thereof, and one-half of all the lands up to 400,000 acres which shall be first acquired on account of the construction of the present uncompleted line of railroad from Crookston to St. Vincent, or any part thereof, by virtue

of any grant of lands which has been or which hereafter shall be made to aid in the construction of said lines of railroad, shall be reserved and retained by the state, to be used by it for the payment of the claims incurred for work and material furnished in the construction of said lines of railroad, statements of which claims were filed in the state auditor's office, in pursuance of an act of the legislature approved February 21, 1874, entitled," etc.

"If any of the lands so reserved shall remain undisposed of by the state after the payment of the claims of the said claimants, such residue shall be conveyed by the governor to the company which shall have completed the portions of railroad to which the lands comprising such residue shall appertain. The land so reserved shall be applied to the purposes for which such reservation is made, in manner following: The governor, attorney general and railroad commissioner, or any two of them, shall, as soon as may conveniently be after the passage of this act, examine into the claims, statements of which have been filed in the state auditor's office, as hereinbefore mentioned, and adjust and ascertain the amount remaining owing and unpaid to the parties respectively who have filed such claims for work or materials, or for both, furnished in the construction of said extension lines of railroad; and they shall file in the state auditor's office a compiled statement of the amounts so ascertained by them to be owing and unpaid upon said claims, to the said parties respectively. In ascertaining the amounts so owing to said claimants, the said officers shall be empowered to examine witnesses under oath; and the concurrence of any two of said officers shall be sufficient for the determination of the amount remaining owing on any such claim. If it shall be made to appear to said officers that the work or materials embraced in any such claim were furnished by the claimant under a contract with any other of said claimants, such fact shall be set forth in such statement.

"Whenever, after the amounts remaining unpaid upon said

claims shall have been ascertained as herein provided, and any of the lands reserved as herein provided shall have been patented or otherwise conveyed by the United States to this state, such lands, or so much thereof as may be necessary for such purpose, shall be sold by the governor at public auction, and the net proceeds of all such sales be forthwith distributed ratably by the governor among said claimants, in proportion to the amounts found to remain due and owing upon their respective claims as herein provided; such notice of the time and place of such sale being first given as the governor shall consider best calculated to inform the public thereof. Such sales shall take place from time to time, as portions of the lands reserved as herein provided shall be patented or otherwise conveyed by the United States to the state, until the net proceeds of such sales shall have become sufficient to pay said claims in full, or until all such lands shall have been all sold."

The section also provides for a conveyance by the governor to the purchasers of the lands that may be so sold. It also directs how the reserved lands shall be selected by the governor, and that the "selections shall be made from time to time, as the lands are acquired from the United States, until 300,000 acres in all shall have been so selected and set apart."

The evident purpose of this section was to retain in the state the title and control of the lands thereby reserved, to be disposed of in the manner and for the purposes therein stated, until the objects of the reservation should be fully accomplished, and that then, and not before, the company building and completing either of said lines of road should be entitled to receive from the governor a conveyance of that portion of the "residue" thereof, pertaining to the line of road thus completed, which should remain undisposed of by the state at that time. The specific claims intended to be benefited by the provisions of the act are identified as those which were filed with the state auditor, under the act of February 21, 1874, and their nature and character are shown, not only

by that act, in which it is stated by whom and on what account they were incurred, but by that clause of the section under consideration which says that they were "incurred for work and material furnished in the construction of both said extension lines of railroad." That no distinction was intended to be made in respect to the adjustment or payment of the claims, or the funds out of which they were to be paid, is apparent from the provisions regulating the adjustment of the claims, the sale of the reserved lands, and the distribution of the net proceeds among the claimants. Only the aggregate amount owing and unpaid upon each claim is required to be found and specified in the "compiled statement" of claims, without any finding or statement as to how much of it accrued in the construction of either line of road. After this "compiled statement" is made and filed, the selections are to be made, and the sales proceeded with from time to time, as the granted lands pertaining to said lines of road are patented or certified to the state; and upon each sale of any of the reserved lands, the net proceeds realized therefrom are to be distributed ratably among all the claimants, according to the several amounts found to be owing them, as shown by said "compiled statement."

As, under the congressional grant, the state was entitled to have the granted lands pertaining to each ten-mile section of road patented or certified upon the completion of every such section, it is obvious that, in the enactment of this section 9 of the act now under consideration, the legislature must have fully contemplated the contingency that has since happened—that, in carrying out its provisions, all the lands which were reserved from the grant given by congress in aid of the Watab & Brainerd line of road might, by reason of the prior completion of that line, be required to be sold and applied towards the satisfaction of said claims, before any of the lands pertaining to the other line would be reached; and that, in such event, the first-named reservation might be subjected to more than a proportionate share of the burden of

satisfying such claims. But the appellant company has no legal right to complain of this apparent hardship, for the reason that it voluntarily availed itself of the provisions of the act and its benefits, with full knowledge of all the burdens the happening of such a contingency might entail.

In respect to the amounts which were awarded to the several claimants by the commission which was created for that purpose by the act, the determinations of the officers composing the commission are final and conclusive. It is not shown by any allegation that they have in any manner exceeded the authority delegated to them, and the act makes no provision for reviewing or correcting any errors of judgment they may have committed.

The suggestion that the questions submitted for their determination involve the exercise of judicial power, such as cannot, under the constitution, be conferred upon members of the executive department, is without any foundation whatever in fact. In providing for the sale of the lands in question, and the distribution of the net proceeds among the claimants, the state was simply dealing with its own property, under the restraint of no contract obligations to either the claimants or the appellant company. As to them, it could dispose of the proceeds in any manner and upon any principles it saw fit. It was within the sole discretion of its legislature to adopt any other mode of disposition and distribution than that contemplated by this act. It might arbitrarily have designated in the act each claimant, and the particular amount which he should be entitled to receive out of the bounty from the state, and no one would have any legal right to complain. Instead of this, it has seen fit to submit the matter of the adjustment of such claims, under certain prescribed regulations, to officers of its own selection, and in whose judgment it has confidence; and it has declared that their determination in the matter shall form the basis upon which the bounty of the state shall be apportioned among the claimants; and if

it is satisfactory to the state, no one else can complain, as it affects the personal or property rights of nobody.

In view of these considerations, the court is of the opinion that, upon the allegations of the complaint, the appellant company has not shown itself entitled to any relief against the commission of the acts which, it is charged, the governor is about to commit, even though that officer can be and has been, in this case, properly subjected to the jurisdiction of the court. Nor can an accounting be required of the respondents herein in respect to their claims, for, if the views already expressed are correct, it is clear that, upon the facts stated in the complaint, no sufficient ground for an accounting exists.

Order affirmed.

GILFILLAN, C. J. I concur in the decision on the merits, but am not prepared to agree that, because the action will not lie against the governor, it may not be retained as against the other defendants.

COUNTY OF RAMSEY *vs.* WASHINGTON M. STEES.

July 16, 1880.

Eminent Domain—Appeal.—Sp. Laws 1878, c. 150, being "An act to authorize the location of an avenue around Lake Phalen," gives an appeal from the district to the supreme court.

Evidence *held* sufficient to justify the verdict.

Appeal by plaintiff from an order of the district court for Ramsey county, *Wilkin*, J., presiding, refusing a new trial.

J. J. Egan, for appellant.

Bigelow, Flandrau & Clark, for respondent.

BERRY, J. Special Laws 1878, c. 150, is "An act to authorize the location of an avenue around Lake Phalen," and in sec-

tion 6 it is provided that "any owners of lands through which said road passes may appeal from the appraisement of damages" made by the commissioners appointed to lay out the same, "to the district court of Ramsey county." Section 7 provides that "such appeal shall be taken by the services of a notice in writing, one upon the county auditor and one upon the county attorney of Ramsey county, and on the filing in the office of the clerk of the district court a copy of such notice, with proof of service, with a description of the property taken, and the amount of the commissioners' award, together with appellant's grounds of appeal, the appeal will be deemed to be complete, and thereafter proceedings shall be had as in actions originally commenced in the district court."

We think that the last clause of this section gives a right of appeal from the district court to this court. "Thereafter proceedings" is equivalent to "proceedings thereafter"—an expression broad enough to include such right of appeal; and as it is the general policy and practice of our statutory law to provide for the review of proceedings in the district courts by appeal, rather than in any other way, we think such construction should be given to the expression mentioned as will follow out this policy and practice as far as may be. The present respondent's motion to dismiss the appeal is accordingly denied.

This case was tried in the district court by a jury, by whose verdict damages were awarded to the present respondent in the sum of \$2,600. The present appellant moved simply for a new trial. No exception having been taken on account of any alleged error in the course of the trial, the only real question before the district court upon the motion was whether the verdict was justified by the evidence. Upon this question there is no room for doubt. There was abundance of evidence to sustain the verdict. The position that the commissioners acted without jurisdiction, even if it be a sound position, furnished no reason for granting a new trial.

Order affirmed.

STATE OF MINNESOTA *vs.* MATHEW GALVIN.

July 16, 1880.

Complaint for Obstructing Highway.—The provision of Gen. St. 1878, c. 13, § 65, which makes it the duty of the board of town supervisors to make complaint of and prosecute persons obstructing public highways, is not exclusive. Such complaint may be made by any person.

The chairman of the board of supervisors of the town of Brownsville, in Houston county, made complaint against defendant before a justice of the peace of the county, for obstructing a highway in that town. A warrant issued, and the defendant was arrested and brought before the justice. He pleaded not guilty, waived a jury, was tried and convicted, and fined \$10, with costs. He appealed, on questions of law and fact, to the district court for Houston county, and in that court moved that the judgment of the justice be reversed. The motion was denied by *Page, J.*, who ordered judgment of affirmance, which was entered, and the defendant again appealed.

P. J. Smalley, for appellant.

Chas. M. Start, Attorney General, for the State.

BERRY, J. Gen. St. 1878, c. 13, § 65, provides that whoever obstructs a public highway, with intent to prevent the free use thereof by the public, shall be subject to a fine of from five to twenty-five dollars, etc., and then proceeds as follows: "And it is hereby made the duty of the board of supervisors of the several towns of this state to make complaint and prosecute, in their official capacity, all violations of the provisions of this section."

Section 66 of the same chapter gives to justices of the peace jurisdiction to hear and determine all cases arising under section 65; and Gen. St. 1878, c. 65, § 140, gives them jurisdiction to hear, try, and determine all charges for offences arising within their respective counties, where the

punishment does not exceed a fine of \$100, or three months' imprisonment; and section 141 in effect provides that complaint that any such offence has been committed may be made to a justice of the peace of the proper county by any person.

In view of these provisions of statute, it is plain that that part of section 65, chapter 13, making it the duty of the board of supervisors to make complaint of obstructions of highways, is not exclusive. Such complaint may be made by any person. In making it the duty of the supervisors to complain and prosecute, we presume that the only design of the legislature was to specify officers whose particular business it should be to see that the law was enforced. To accomplish this purpose it was not necessary to exclude complaints by private persons, and we do not think any such exclusion was intended.

2. As to the amount of the costs, the judgment of the justice is a little informal, but there is no chance to misunderstand what was meant.

3. The judgment of the district court is not erroneous upon its face; and as there is no case or bill of exceptions enabling us to review any errors which may have occurred in the proceedings of which it is the result, it must be taken to be right.

Judgment affirmed.

27	18
41	390

H. B. WILLIS vs. JACOB JELINECK.

July 20, 1880.

Redemption from Foreclosure Sale—Rights of Creditors.—The right of redemption given to a senior creditor by Gen. St. 1866, c. 81, § 16, when once vested, becomes a property right, which cannot be divested against the consent of the creditor without due process of law.

Same—Judgment Lien on Undivided Interest of Heir—Parol Proof of Death and Heirship.—A judgment lien upon an undivided interest of real estate is a lien upon some part thereof, within the meaning of said section 16, sufficient to uphold the right of redemption given by that section. Upon an issue as to the existence of a right of redemption, founded upon a judgment against one of the heirs of a mortgagor decedent, intestate, no administration having been had upon the estate, the facts showing such death and heirship may be proved by parol.

Levy on Personalty held not a Satisfaction.—A levy upon sufficient personal property to satisfy a judgment does not operate as a satisfaction thereof, when the property so levied on has already been transferred to and is held by an assignee of the judgment debtor, for the benefit of creditors, and such levy is subsequently released, and the property returned to such assignee, at the request and for the benefit of such debtor.

Assignment of Judgment—Clerical Error.—Where, upon the face of a written assignment of a judgment, the identity of such judgment plainly appears, notwithstanding an erroneous statement therein as to the date of its rendition and docketing, the error will be treated as a mere clerical one and disregarded.

Notice of Intention to Redeem—Filing.—The statute, (Gen. St. c. 81, § 16,) which requires notice of an intention to redeem to be filed in the office of the register of deeds where the mortgage is recorded, is sufficiently complied with when such notice is left in the office of such officer, and is thereupon by the register recorded and indexed.

Redemption from Deputy Sheriff.—A redemption allowed to be made from a sheriff, under Gen. St. c. 81, § 14, may be made from a deputy in charge of the office of the sheriff, in the absence of the sheriff himself.

Effect of Certificate of Redemption as Evidence.—A certificate of redemption given pursuant to the provisions of Gen. St. c. 81, § 15, and in conformity therewith, is *prima facie* evidence of the fact of a redemption, and of the truth of its recitals, so far as they relate to matters required to be stated in such certificates by that section.

Action of ejectment, tried in the district court for Ramsey county before *Brill, J.*, a jury being waived. Judgment was

ordered for the defendant, a new trial was denied, and plaintiff appealed.

Palmer & Bell, for appellant.

John B. & W. H. Sanborn, for respondent.

CORNELL, J. Action to recover possession of certain real estate, both parties claiming title under a sale upon a foreclosure by advertisement of a mortgage given in April, 1867, by one Mary A. Haus and her husband. The sale was made by the sheriff, October 17, 1876, to one Richmond, who became the purchaser, and received the usual certificate of sale and purchase. It is admitted by the pleadings that no redemption was had within the twelve months next after the sale, by any of the parties who were entitled to redeem under the provisions of Gen. St. 1866, c. 81, § 13. Plaintiff's claim is that no redemption whatever has ever been made under either section 13 or 16 of said chapter, though the time allowed therefor has expired, whereby the rights acquired by the purchaser at said sale, and evidenced by the certificate, have ripened into an absolute title, which is now held by plaintiff. On the part of the defence, the claim is that the property was duly redeemed from such sale, within the five days allowed by law, under said section 16, by one Fink, the defendant's lessor, as a senior creditor, who had a lien upon an undivided estate or interest in the premises, by virtue of a judgment rendered and docketed April 1, 1875, against one Vitt, who had acquired a title to such undivided interest, derived from the mortgagor subsequent to the mortgage. Said judgment was rendered in the district court of Ramsey county, in favor of Elias S. Higgins and Nathaniel D. Higgins, partners as E. S. Higgins & Co., plaintiffs in the action, and was assigned, as defendant alleges, by them to one Sanborn, and by the latter to said Fink, who claims to have been the owner thereof at the time of his alleged redemption.

The cause was tried by the court without a jury, and the issues presented for trial, it will be seen, involved the right of Fink to redeem under the statute, (Gen. St. c. 81, § 16,)

and also the fact of his alleged redemption and its validity. In respect to the first point, the contention is that such right, if it ever existed, had been cut off by the repealing act of March 3, 1877, (Laws 1877, c. 121,) which, it is claimed, had the effect of abrogating entirely the provisions of section 16 aforesaid, and all Fink's rights thereunder. The answer to this position is that, prior to the passage of this repealing enactment, the lien of the judgment which Fink had acquired and held had already attached to the property; and if it was sufficient to entitle him to redeem as a senior judgment creditor, it secured to him the right, in case no redemption was had under section 13 by any of the parties therein designated, within the time therein prescribed, to redeem upon complying with the conditions of sections 14 and 16 of said chapter of the General Statutes, and thereby to acquire, from the holder of the certificate of purchase, all the rights which he had obtained from the purchase, and then held under such certificate of purchase, by paying therefor the amount of the purchase-money, and interest. This was a vested, valuable property right, of which Fink could not be divested or deprived without his consent, except by due process of law, and hence it was not and could not be affected by the repealing act of March 3, 1877.

The suggestion that, the lien of the judgment upon which Fink's redemption was founded being only upon an undivided interest in the property, it therefore gave no right of redemption, is met by the statute, which enacts in express terms that "if no such redemption is made," (i. e., none under section 13,) "the senior creditor having a lien, legal or equitable, on the real estate, or *some part* thereof, subsequent to the mortgage, may redeem," etc. An undivided interest in real estate is "some part" of it, within the meaning of this statute, liberally construed, as it must be under the decisions of this court. *Williams v. Lash*, 8 Minn. 441 (496;); *Tinkcom v. Lewis*, 21 Minn. 132.

Upon the trial, defendant was permitted, against plaintiff's

objection, to prove by parol that the mortgagor, Mary A. Haus, died intestate in 1871, leaving her surviving her husband and five children, her sole heirs at law; that her estate had never been administered on, and that she left no debts outstanding against her estate; and, further, that four of her said children, together with her said husband, joined in executing and delivering to said Vitt, the judgment debtor named in the judgment under which defendant claimed the right to redeem, on the 6th day of May, 1872, a good and sufficient deed of conveyance to pass to him, and his heirs and assigns, all the interest and estate in said mortgaged property which had become vested in them by reason of the death of the said mortgagor. This was competent evidence for the purpose of showing that Vitt had an estate or interest in the mortgaged property, which became subject to the lien of the judgment against him by virtue of which Fink claimed the right to redeem the premises from the sale under the mortgage. Under the law regulating the descent of real property, the equity of redemption which remained in the mortgagor at the time of her death immediately passed to her husband and children, subject only to the payment of her debts, if any; and it was competent for the latter to convey whatever estate or interest they thus acquired, without waiting for administration upon her estate. The ruling of the court below upon the admission of this evidence was not error.

The objection that the judgment against Vitt was satisfied prior to the redemption, by reason of a levy on execution upon sufficient personal property to satisfy the same, is fully met by the finding of the court that there was actually due and unpaid thereon the sum of \$694.78; and the evidence contained in the record before us sustains the finding, without reference to the presumption in its favor which arises from the fact that the settled case does not purport to disclose all the evidence that was given on the trial. The evidence included in the case justifies the conclusion that the personal property so levied on had already been transferred by the judgment debtor

to his assignee, Kiefer, for the benefit of his creditors, and that the assignee had the possession of the property at the time the levy was made. It further shows a subsequent release of the levy, and a return of the property to the assignee, under an arrangement to which Vitt was a party, by virtue of which the property was afterwards disposed of for his benefit, and that it was a part of this arrangement that the judgment was to be assigned to Fink, to hold as a lien upon the real property of the debtor, to indemnify him and his associates against liabilities they had incurred for him under said arrangement. Upon no principle or authority can a levy and release under such circumstances be held to operate as a payment. The presumption of payment which arises from the fact of a levy upon sufficient property of the judgment debtor to pay the debt, is rebutted by the facts themselves. *First Nat. Bank v. Rogers*, 15 Minn. 381. Upon these facts, Vitt cannot be heard to repudiate the validity of the arrangement, because he has participated in its benefits; and the plaintiff in this case cannot assail it, for he is claiming solely under Richmond, the purchaser at the mortgage foreclosure sale, and his legal rights, therefore, antedate and are wholly unaffected by the transaction.

Fink's right to redeem is further assailed, on the ground that the written assignment from Sanborn to him was insufficient to pass the title to the judgment, because of the erroneous reference therein to it as a judgment entered and docketed the 18th day of April, 1875, instead of April 1st, as was the fact. That this was merely a clerical error of description, incapable of misleading any one under the circumstances, manifestly appears upon the face of the assignment itself, and also from the other facts proved beyond question and undisputed. In such assignment the action is entitled the same as in the assignment from the plaintiffs therein to Sanborn. The latter is described in it as the assignee of the above-named plaintiffs, and of the judgment in said entitled action, and professes to transfer the same to Fink. Sanborn

executed it on the 16th day of June, 1875, and filed it, together with the assignment to himself, on the same day, with the clerk of the court wherein the judgment was rendered, as a paper relating to the same judgment; and the clerk made a note of both said assignments on the docket of said judgment. Sanborn acted for Fink and as his attorney in making the redemption from the sheriff, and then produced both assignments as links in Fink's title to said judgment; and it also appears that he took the assignment to himself, and made the one to Fink, under the arrangement entered into between Vitt and his creditors, and Fink and his associates, at the time the levy was released, and to carry out the same. In view of these facts, it is clear that the court committed no error in receiving the assignment in evidence, treating the wrong date as a clerical error that worked no prejudice, and in his finding that Fink was the owner of the judgment.

The objection that the notice of intention to redeem, being only recorded and indexed in the office of the register of deeds, was not, therefore, filed in that office, within the meaning of the statute, is without merit. The former includes the latter, and answers all the purposes intended by the statute.

It remains to consider whether Fink made the redemption from the proper officer, and substantially complied with the requirements of Gen. St. c. 81, § 14, in making it. As to the first point, the redemption was made from the deputy sheriff, at the time in charge of the office of the sheriff, the latter being absent. This was right, as was settled in *Williams v. Lash*, 8 Minn. 441 (496.) In respect to the matter of a redemption from a sheriff who has made a sale upon a mortgage foreclosure, the law treats the sheriff as an officer, and not as a person acting in his individual capacity.

Upon making the redemption in this instance, the officer from whom it was made duly made, acknowledged, and delivered to Fink a certificate of redemption, in strict conformity with the provisions of Gen. St. c. 81, § 15, and it was recorded

in the office of the register of deeds of the proper county on the same day. This certificate was put in evidence on the trial, and it was *prima facie* evidence of the fact of redemption, and of the truth of its recitals, so far as they related to any facts required to be stated in such a certificate by that section. The facts therein stated, if true, show a substantial compliance on the part of Fink, in making his redemption, with the requirements of said section 14. None of them were controverted or questioned by any evidence given on the trial, except the statement that the deed to Vitt embraced the interests of all the heirs of Mary Ann Haus, which was shown to be untrue as to Alice, one of the heirs. This, however, was an immaterial matter, as Fink's right of redemption was the same whether the entire equity of redemption was vested in Vitt by that deed, or only a part of it.

The findings of the court, therefore, upon this branch of the case must be sustained, though the additional proofs allowed to be made upon the trial, against the objections of the plaintiff, in reference to what was done by Fink in the way of compliance with the provisions of said section 14, are wholly excluded and stricken from the case. As the reception of such proofs did not prejudice the plaintiff, the rulings thereon, whether right or wrong, are of no consequence as affecting the question before us of granting or refusing to grant a new trial.

Order affirmed.

COUNTY OF MOWER *vs.* JOHN P. WILLIAMS.

July 22, 1880.

27	25
179	881
179	882

Salary of County Auditor.—Under the act of March 4, 1871, the salary and clerk-hire of a county auditor for each official year, to wit, the year commencing March 1st, is to be calculated upon the equalized value in the county for the year preceding the commencement of such official year. Under that act, the salary, where the valuation exceeds \$1,500,000, is to be calculated at the rate of five mills per dollar of the first \$100,000, one-half of one mill per dollar of the next \$2,000,000, if there be so much, and one-fifth of one mill per dollar on the excess, if there be any, above those two amounts.

Appeal by plaintiff from a judgment of the district court for Mower county, *Page, J.*, presiding.

C. C. Kinsman, for appellant.

E. O. Wheeler, for respondent.

GILFILLAN, C. J. The court below appears to have adopted, in calculating the defendant's salary and clerk-hire, under the act of March 4, 1871, (Laws 1871, c. 90,) these two propositions:

First. That the salary and clerk-hire for a county auditor's entire official year—that is, the year commencing March 1st—is to be calculated upon the equalized value of the taxable property in the county for the year preceding such official year, so that the salary and clerk-hire for, say the entire official year commencing March 1, 1871, and ending February 29, 1872, is to be calculated upon the equalized valuation for the year 1870.

Second. Where the equalized valuation exceeds \$1,500,000, the salary is to be calculated at the rate of five mills on each dollar of the first \$100,000, one-half of one mill on the dollar of the excess, up to \$2,000,000 of such excess, if there be so much, and one-fifth of one mill on each dollar of the excess above these two sums, to wit, the \$100,000 and the \$2,000,000, if there be any such excess; so that if the valuation be just \$2,500,000, the salary is to be calculated at the rate of five

mills on the first \$100,000, one-half of one mill on \$2,000,000, and one-fifth of one mill on \$400,000. The clerk-hire was estimated on the same principle, but at the proper rate.

We think the court was clearly right upon both of these propositions.

Judgment affirmed.

WILLIAM W. PINNEY *vs.* OLE JORGENSEN.

July 22, 1880.

27	26
58	566
27	26
180	164

Tender—Offer without Production of Money.—Where, upon an allegation of tender of a debt, the proof shows that the money was not produced, but that the debtor offered to pay, and informed the creditor that he then had the money ready to pay, the creditor refusing to accept it, it is error to exclude evidence that the debtor then had the money with him ready to pay.

Same—Stipulation in Note to pay Expenses of Suit.—A note, after the promise to pay a sum stated, continued, "And if not paid when due, and the same is sued, \$10 if sued in a justice's court, and \$25 if sued in a district court, additional, to defray the expenses of plaintiff for his suing the same, to be entered up as a part of the judgment." *Held*, the right to the additional sum does not accrue if, before suit brought, the debtor tenders the amount due on the note, and the creditor refuses to receive it, even though it does not appear that the debtor, at all times after the tender, held the money ready to pay, there being no subsequent demand by the creditor.

Appeal by defendant from a judgment of the district court for Kandiyohi county, *Brown, J.*, presiding, affirming a judgment of a justice of the peace from which the defendant had appealed on questions of law alone.

John W. Arctander, for appellant.

Jenness & Ransom, for respondent.

To constitute a tender there must be an actual presentation of the money, unless the production thereof is excused by some positive act or declaration. *Strong v. Blake*, 46 Barb.

227; *Hornby v. Cramer*, 12 How. Pr. 490; *Bakeman v. Pooler*, 15 Wend. 637. The plaintiff should have been tempted by a sight of the money. 2 Greenl. Ev. § 602. The defendant's testimony at best shows but a mere offer of compromise, and cannot be construed into a case where the actual production of the money was dispensed with by plaintiff's refusal to take it. *Dunham v. Jackson*, 6 Wend. 22; *Kraus v. Arnold*, 7 J. B. Moore, 508; 17 Eng. Com. Law, 59; *Thomas v. Evans*, 10 East, 101; 2 Greenl. Ev. § 603.

GILFILLAN, C. J. Action on a note which, after the promise to pay a stated sum, continued, "And if not paid when due, and the same is sued, \$10 if sued in justice court, and \$25 if sued in district court, additional, to defray the expenses of plaintiff for his suing the same, to be entered up as a part of the judgment." The note was sued in a justice court, and the defence as to the \$10 is a tender before suit brought of the amount due on the note. At the time of the alleged tender, there was due and unpaid, of the amount mentioned in the note, only \$8.60.

The evidence as to the tender was that of defendant, who testified in respect to it: "Pinney said I had to pay \$21.60. I told him I wanted to settle up that note at that time. I said, 'Pinney, I will give you \$10, if I can get that note.' Pinney said, 'I can't take that;' but I think he said he would knock off the 60 cents, and call it \$21. I then and there offered to pay Mr. Pinney \$10 for that note. He answered, 'No, I cannot take that.'" The defendant's counsel then asked him if he was ready and willing to pay the money then; if he then had it in his pocket separate and ready to pay; if he was about to produce it, but was prevented by plaintiff declaring he would not take it; and if he was ready to and would have produced it, if the offer had been accepted. These several questions were objected to, unless defendant showed that he informed plaintiff of the fact that he had the money ready, etc., and the objections were sustained.

To make a tender of money valid, the money must be act-

nally produced and proffered, unless the creditor expressly or impliedly waives this production. Before a refusal to receive the money can be held a waiver of its production, I think it must appear that the creditor then knew or was informed of the debtor's ability then and there to produce it. The majority of the court are of the opinion that what defendant said to plaintiff informed him that he then and there had the money ready to pay. That being so, there was a valid tender, if, in fact, the defendant had the money with him ready to pay. He should have been allowed to prove that fact. It was error to exclude the answers to the questions intended to show the fact.

It is claimed, however, that the tender was ineffectual, because it was not kept good by bringing the money into court when the answer was filed. That a tender must be kept good by having the money at all times ready to pay over is true, when the effect claimed for it is to avoid interest after the tender, and costs of suit. The right to the \$10 is here only in question. That \$10 was no part of the original debt. It was in the nature of a penalty for failure to pay the debt without suit. The right to it accrued, if it did accrue, at the instant the suit was brought, and was not affected by anything occurring subsequently. It could accrue only where it was through failure of the defendant to pay the debt that suit was brought. If there was no fault of the defendant, but he was prevented paying the debt by plaintiff's refusal to receive it, the bringing of suit could not create the liability. The parties to the contract did not intend that the bringing of the suit should entitle plaintiff to the \$10 where the debt remained unpaid from his fault. The right to the \$10 never accrued, if the debt was, before suit brought, duly tendered; and it could not, after that, accrue, unless, perhaps, in case of a demand for the debt, and refusal to pay before suit brought.

Judgment reversed.

DAVID W. WATSON vs. ORTON P. WARD.

July 22, 1880.

Justice of Peace—Jurisdiction—Costs.—Section 8, article 6, of the constitution of this state provides that “no justice of the peace shall have jurisdiction of any civil cause where the amount in controversy shall exceed \$100.” The “amount in controversy” here mentioned does not include the costs of litigation.

Same — Appeal on Questions of Law — Power of District Court. — Upon an appeal to the district court from the judgment of a justice of the peace, upon questions of law alone, the judgment may be so modified as to correct errors of law appearing upon the return, by which the appellant is aggrieved, if the erroneous part of the judgment is distinct and separable from the rest of it.

Same — Costs in District Court. — If a defendant appeals to the district court from the judgment of a justice of the peace, and does not succeed in reducing the amount of the recovery before the justice one-half or more, the plaintiff is entitled to his costs and disbursements in the district court.

Plaintiff brought this action in a justice's court, to recover possession of a colt, stated in the affidavit and complaint to be of the value of \$70, and for \$30 damages for its detention, and for costs. The property was taken from defendant under the writ, and delivered to the plaintiff, who afterwards had judgment that he retain possession of the property, and for \$20 damages, and his costs taxed at \$15.91. The defendant appealed, on questions of law alone, to the district court for Goodhue county, where the cause was tried before *Crosby, J.*, who ordered that the judgment of the justice “be so modified that the plaintiff have judgment that he is entitled to the possession of the personal property described in the complaint, which is of the value of \$70, and that he retain possession thereof, and for his costs in justice court; and that he recover nothing for damages for the detention of said property.” Judgment was entered pursuant to this order, and for plaintiff's costs in the district court, and the defendant again appealed.

J. C. McClure, for appellant.

F. W. Hoyt, for respondent.

37	39
40	64
27	29
51	342
27	29
68	168
27	29
80	441

BERRY, J. 1. Section 8, article 6, of the constitution of this state provides that "no justice of the peace shall have jurisdiction of any civil cause where the amount in controversy shall exceed one hundred dollars." In the meaning of this section, the words "the amount in controversy" do not include the costs of litigation. They have reference to the subject of the litigation, of which the costs are a mere incident.

2. The evidence was certainly sufficient to sustain the finding of the unlawful and wrongful taking and detention charged in the complaint.

3. By Gen. St. 1878, c. 65, § 117, upon an appeal from the judgment of a justice of the peace to the district court, upon questions of law alone, "the action shall be tried in the district court upon the return of the justice." "A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact." Gen. St. 1878, c. 66, § 214. Upon the appeal upon questions of law alone, then, a judicial examination of the controversy between the parties is to be had upon the return of the justice. If, upon such examination, errors of law appear by which the appellant is aggrieved, and which show that the judgment is, in part, erroneous, the judgment may be so modified as to correct the error, if the erroneous part is distinct and separable from the rest of the judgment. *State v. Bliss*, 21 Minn. 458; *Hinds v. American Express Co.*, 24 Minn. 95.

4. The defendant appealed from the judgment of the justice to the district court in this case. Not having succeeded in the district court in reducing the amount of the plaintiff's recovery before the justice one-half or more, the plaintiff is entitled to his costs and disbursements in the district court. Gen. St. 1878, c. 67, § 14.

5. The plaintiff not having appealed from the judgment of the district court, we cannot consider the alleged error of which he complains.

Judgment affirmed.

JOHN P. ROLES vs. WILLIAM L. MINTZER:

27	31
40	152

July 22, 1880.

Evidence—Agreed Price in Oral Contract of Hiring.—Where the issue is as to the price agreed on, in an oral contract of hiring, it is immaterial that about the time of the hiring the plaintiff offered to work for some other person at the same price that defendant contends was agreed on between him and plaintiff.

Evidence *held* sufficient to sustain the verdict.

Appeal by defendant from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial.

Chas. N. Bell, for appellant.

Edwin Gribble, for respondent.

GILFILLAN, C. J. The evidence was sufficient to sustain the verdict. The action being on an alleged oral contract of hiring, in which, as plaintiff testified, defendant agreed to pay him \$20 per month and his board and washing, while defendant denied this, and testified he was to work for his board, defendant, on the cross-examination of plaintiff, asked him if, about the time he went to work for defendant, he tried to engage for work for one *Whitcher* for his board, to which plaintiff answered he did not. On his defence, defendant offered to show by *Whitcher* that about that time plaintiff came to him, and offered to work for him for his board. This was offered for the purpose of contradicting plaintiff's answer on cross-examination, and also to show he was inclined to make an agreement of that kind at that time. The matter was immaterial. It would not tend to show that the testimony of defendant was more reasonable than that of plaintiff as to the terms of the contract between them. It is to be presumed that, ordinarily, in men's contracts, the price upon hiring or sale is agreed on with reference to the value of the thing hired or sold. So, where there is a dispute as to price agreed on, the value may be of some weight in determining which of the prices testified to is most probably the

one actually agreed on. *Kumler v. Ferguson*, 7 Minn. 351 (442;); *Schwerin v. De Graff*, 21 Minn. 354; *Miller v. Lamb*, 23 Minn. 43. But there is no presumption that a person will work for one man on certain terms, from the fact that he is willing to work for some other man on those terms.

Order affirmed.

ANNA M. BECKER vs. SAMUEL C. DUNHAM.

July 22, 1880.

Chattel Mortgage—Redemption—Garnishment.—Under Gen. St. 1878, c. 39, § 8, and c. 66, § 183, where the mortgagee in a chattel mortgage has not sold the mortgaged goods or foreclosed the mortgage, the mortgagor has a subsisting right of redemption, which is subject to the claims of the mortgagor's creditors, and may be reached by garnishment. Whether it can properly be reached by a levy upon the mortgaged goods in the rightful possession of the mortgagee, *quære*.

Same—Attachment—Measure of Mortgagee's Damages.—But where the goods are in fact seized upon writs of attachment against the mortgagor while in the rightful possession of the mortgagee, the latter, in an action against the levying officer, can recover only the value of his interest in the goods.

Appeal by defendant from an order of the district court for Rice county, *Mitchell*, J., presiding, (acting for the judge of the 5th district,) refusing a new trial. The case is stated in the opinion.

J. H. Case, for appellant.

At the time of the attachments, the mortgagors had a leivable interest in the property covered by the chattel mortgages, and the defendant might lawfully levy upon and sell such property, subject to the liens of the mortgages. Gen. St. 1878, c. 39, § 8; c. 66, § 309; *Hall v. Sampson*, 35 N. Y. 274.

The plaintiff, by virtue of her chattel mortgages, had a special interest only in the mortgaged property, and could

recover; if at all, only the value of her interest therein, which could not exceed \$340, and interest from November 20, 1878, being that portion of the mortgage debt owned by her. *La Crosse & Minn. Packet Co. v. Robertson*, 13 Minn. 291; *Ward v. Henry*, 15 Wis. 262; *Saxton v. Williams*, Id. 320; *Parish v. Wheeler*, 22 N. Y. 494, 512; *Sedgwick on Damages* (6th Ed.) 601-3, 662-3.

Baxter & Quinn, for respondent.

The argument that mortgaged property is subject to levy and sale on execution against the mortgagors is inapplicable to the facts of this case, since, under the clause in the mortgages, the plaintiff had a right to take possession of the property, "at any time when she may think proper," (*Hall v. Sampson*, 35 N. Y. 274; *Sherman v. Clark*, 24 Minn. 37;) and the plaintiff having exercised that right, the interest of the mortgagors in the property was extinguished, and there remained in them but the right of redemption. *Gordon v. Hardin*, 33 Iowa, 550; *Mattison v. Baucus*, 1 N. Y. 295; *Galen v. Brown*, 22 N. Y. 37; *Hall v. Sampson*, 35 N. Y. 274.

There is no question but that the note the plaintiff's title to which is in dispute, was in her possession, and is a valid debt of the mortgagors. It is also found that the mortgages are free from any fraud. Such being the case, and no fraud, accident or mistake being alleged or proved, the defendants, (if they have any rights at all as against plaintiff,) having only the interest of the mortgagors, are not in a situation to object that plaintiff is not owner of the debt evidenced by such note. *Foster v. Berkey*, 8 Minn. 310 (351.) That debt was due and payable, and the mortgage provides that the proceeds of a sale thereunder should be applied to satisfy it. When so applied the indebtedness of the mortgagors is lessened by such amount, and the mortgagors receive the benefit and their creditors lose nothing, no matter who holds the security. *Foster v. Berkey*, 8 Minn. 310 (351.)

The contract being one of mortgage, only the plaintiff, or some one acquiring her legal interest, can enforce it. That

the representatives of her husband may have some right in the debt is a matter of indifference to the mortgagors and judgment creditors. So far as is necessary for the purposes of this action, plaintiff is at least the nominal party in interest, and as such her lien extends to the full amount of the two mortgages, as found by the court.

BERRY, J. The plaintiff seeks to recover the value of certain goods alleged to have been wrongfully taken and converted by defendant. Plaintiff's title to the goods rests upon two chattel mortgages of the same, running to her. One of the mortgages was given to secure a note of \$340 belonging to the plaintiff, and, as respects that mortgage, her right of recovery is clear. The other mortgage was given to secure a note for \$200, which belonged to her husband in his lifetime, and which, at the time when the mortgage was given, belonged to his estate, to which it still belongs, he having deceased. At the time when this note was made, he (the husband) handed it to the plaintiff, (as was his custom with respect to such papers,) but, so far as appears, it was handed to her as a depositary merely, and without any intention to give it to her, or to give her any interest in it.

The defendant, as a proper officer, seized the goods upon sundry writs of attachment against the mortgagors, and subsequently sold the same to satisfy the judgments recovered in the actions in which the attachments issued. At the time of the seizure, the plaintiff was rightfully in possession of the goods, each of the mortgages authorizing her to take such possession at any time when she thought proper, and the note belonging to her being due and unpaid. But as she had not sold the mortgaged goods, or foreclosed, the mortgagor had a subsisting right of redemption. Gen. St. 1878, c. 39, § 8. This right was subject to the claims of creditors, and could, undoubtedly, be reached by garnishment. Gen. St. 1878, c. 66, § 183. Whether it could be properly reached in any other way, as, for instance, by a levy upon the mortgaged property in the rightful possession of the mortgagee, may

well be doubted. But, however this may be, the mortgaged property in this case was, in fact, seized upon the writs of attachment while in the rightful possession of the mortgagee, and sold to satisfy the judgments, so that the practical question is, what can the plaintiff recover? She is entitled to recover the value of her interest in the goods, and no more. *Parish v. Wheeler*, 22 N. Y. 494; *La Crosse & Minnesota Packet Co. v. Robertson*, 13 Minn. 291. She owned no interest in the note belonging to her husband's estate, and, therefore, so far as the mortgage given to secure it is concerned, it secured nothing belonging to her, and, for that reason, gave her no interest in the goods. Her interest in the goods is, therefore, limited to the amount of the \$340 note.

The court below was, therefore, wrong in giving judgment for the full value of the goods, to wit, \$463, this sum exceeding the amount of her note. The case is, accordingly, remanded to the district court, with directions to modify the judgment, so as to reduce the amount recovered to the amount of the note for \$340.

HENRY MORTON vs. CHARLES C. LELAND.

July 22, 1880.

Deed—Execution—Acknowledgment.—Evidence that an alleged deed was made and executed is evidence that it was signed and sealed, or, in other words, that it was a deed. To pass the title of a grantor to land to a grantee, nothing more is necessary than the execution and delivery of the grantor's deed purporting to pass such title. It is not necessary, for this purpose, that the deed should be witnessed or acknowledged.

Notice as to Person by whom Taxes have been Paid.—New trial granted, on account of the improper admission of evidence to the prejudice of the defendant.

This action was brought in the district court for Waseca county, and was tried before *Lord, J.*, and a jury, who found

27	35
39	123
27	35
41	168
27	35
66	242

for the plaintiff. A motion for a new trial was denied by *Buckham, J.*, and the defendant appealed. The exceptions taken at the trial are stated in the opinion. The deed from Clapp to defendant therein mentioned bears date November 15, 1878, and was duly signed, sealed, attested, acknowledged and recorded. It "witnesseth that the party of the first part for and in consideration of the sum of \$25, to him in hand paid by the party of the second part," (the defendant,) "doth by these presents release and quitclaim to the said party of the second part, his heirs and assigns forever, all the following piece or parcel of land," (describing it,) "to have and to hold the above quitclaimed premises, together with all and singular the hereditaments," etc., "to the said party of the second part, his heirs and assigns forever." It appeared that the consideration expressed in the deed was the sum actually paid by defendant for the land, and that the land was worth in November, 1878, from \$1,000 to \$1,200.

B. S. Lewis, for appellant.

Gordon E. Cole, for respondent.

BERRY, J. This is an action in the nature of ejectment. Both parties claimed title from George R. Clapp; the defendant, through a quitclaim deed executed by Clapp in 1878; the plaintiff, through an alleged warranty deed from Clapp to one Payne, executed in 1861. The evidence tended to show that this deed was in fact made, executed, and delivered to Payne, by Clapp and his wife, and that it was lost. It was never recorded. Evidence that it was made and executed was evidence that it was signed and sealed; in other words, that it was a deed. To pass Clapp's title to Payne, nothing more was necessary than its execution and delivery. For this purpose, neither witnesses nor acknowledgment were requisite. The evidence as to the deed was not very explicit, but we think that it was competent, and fairly tended to make out the plaintiff's case, so far as the execution and delivery of the deed, and its contents, were concerned.

For the purpose of affecting the defendant with notice of

the plaintiff's title, the plaintiff showed that defendant was engaged in the abstract business in Waseca county, where the land in controversy lies; that he advertised himself as having the only complete abstract in the county, and that he was in the habit, to some extent, of examining the records of the county auditor, in his business of making abstracts and keeping abstract books. Upon this basis, the plaintiff, having identified by the auditor three books containing stubs of the receipts of the county treasurer of Waseca county for 1875, 1876, 1878, was permitted, against defendant's objection, to introduce three of the stubs, one for each of said years, purporting to show that the taxes for those years were paid by the plaintiff, or the person from whom he derived title immediately. There was no evidence whatever tending to show that the defendant had ever seen these stubs, or knew anything about them. In fact, the evidence of the plaintiff's witness, Cronkhite, the county auditor, who was the only witness upon the subject, certainly leaves it very doubtful whether the defendant was in the habit of looking up these tax matters himself at all, or to any considerable extent, and goes to show that an abstract maker, looking up taxes, would not look at all at stubs like these, showing not *delinquent*, but *paid* taxes. It seems to us that these facts disclose an entire failure, in several respects, to bring home to the defendant any knowledge or notice of the existence of the stubs. They were, therefore, improperly received. As the evidence and its reception against the defendant's objection were well calculated to influence the jury unfavorably for defendant, there must be a new trial.

To the charge of the trial court the defendant does not appear to take any important objection. The other questions discussed by counsel seem to relate mostly, if not altogether, to matters of fact, upon which, in the disposition made of this appeal, it is not best for us to express an opinion.

Order reversed, and new trial directed.

27	38
40	214
27	38
48	499

27	38
69	112

27	38
77	956

STATE OF MINNESOTA *ex rel.* R. M. Probstfield *vs.* JAMES H. SHARP and others.

July 22, 1880.

Quo Warranto—Burden of Proof—Misconduct of Relator.—A proceeding by information in the nature of *quo warranto*, under Gen. St. c. 63, § 1, is not the action provided for in Gen. St. 1878, c. 79. In the absence of legislation, or any controlling consideration to the contrary, such proceeding is governed, as respects procedure, by common-law rules. The *onus probandi* is, therefore, upon the respondent. It is for the attorney general to determine whether the public good requires him to institute and conduct such proceeding. If he deems it best to proceed, notwithstanding any conduct of the relator, at whose instance he moves, it would be a very extraordinary case (if any) in which his determination would be overruled.

Independent School-Districts may embrace one or more Townships.—Section 3, article 11, of the constitution of this state, authorizes the legislature to pass laws for the organization, for municipal or other town purposes, of one or more townships, whether congressional (*i. e.*, full) or fractional, into a single town. Gen. St. 1878, c. 36, § 94, which enacts that "any city, town, village, township, or school-district, now or hereafter organized, may be organized into and established as an independent school-district," authorizes the formation of a town consisting of any number of townships, congressional or fractional, into a single independent school-district. It is not controlled by section 17 of the same chapter, which restricts the area of the school-districts therein referred to to 36 square miles.

Quo warranto, the respondents being the directors of the "Moorhead Independent School-District," composed of townships 137, 138, 139, 140 and 141, of range 48, and fractional townships 137, 138, 139, 140 and 141, of range 49, all in Clay county; and the purpose of this proceeding being to try the validity of the proceedings by which these ten townships were formed into a single independent school-district, and organized as such. The case is stated in the opinion.

Chas. M. Start, Attorney General, J. M. Shaw and J. W. Griffin, for the State.

Davis, O'Brien & Wilson, for respondents.

BERRY, J. This is a proceeding by information, in the nature of *quo warranto*, under Gen. St. 1878, c. 63, § 1. It is not the action provided for in chapter 79 of said statutes, and the provisions of that chapter are not *per se* applicable to it. In the absence of any legislation or controlling considerations to the contrary, it follows that, as respects procedure, it is governed by common-law rules. The rule that the *onus probandi* is upon the respondent, (High on Ex. Rem. §§ 629, 712, and cases cited; 2 Dillon Mun. Cor. §§ 717, 722; 5 Wait's Practice, 615; *People v. Pease*, 30 Barb. 588, 591,) therefore, applies here, and the defendants must prove the existence of the corporate franchise which they are alleged to have usurped, and their title to the offices, with the wrongful claim or usurpation of which they are charged.

At the start it is objected by the respondents that the relator, Probstfield, has actively acquiesced in the exercise of the franchise spoken of, and the respondents' assumption of title to the offices in question, and in their discharge of the alleged powers and duties of the same, and that he is, therefore, estopped to institute or conduct this proceeding. The answer to this is that it is the attorney general who has instituted and who is conducting the proceeding, as the law officer of the state—the representative, not of the relator, but of the government. It is for him to determine whether the public good requires him to proceed in the matter. If he deems it best to proceed, notwithstanding any conduct of the party at whose instance he moves, if there is any case in which his determination would be overruled, it must certainly be a very extraordinary one, and not such a case as this.

This brings us to the merits. We are first called upon to interpret section 3, article 11, of the constitution of this state, which reads: "Laws may be passed providing for the organization, for municipal and other town purposes, of any congressional or fractional townships in the several counties in the state: *provided*, that when a township is divided by

county lines, or does not contain one hundred inhabitants, it may be attached to one or more adjoining townships or parts of townships, for the purposes aforesaid." This authority to pass laws for the organization of congressional or fractional townships, "for municipal and other town purposes," is an authority to pass laws for the organization of the townships named, for the general purposes of town government, the word "town" being used to denote what is quite commonly spoken of as the New England town; that is, as a portion of the state, bounded by geographical lines, to which, to a greater or less extent, the power of local self-government is committed. The legislature is authorized to pass laws providing for such organization "of *any* congressional or fractional *townships*." We emphasize the word "*any*," and the plural "*townships*," for we take them to be significant. The authority is not limited to the organization of a single congressional or fractional township. It is an authority for the organization of *any* townships, (*i. e.*, one or more,) whether congressional or fractional; but it is not an authority to divide a congressional or fractional township. It was thought, however, that such division would, for obvious reasons, be desirable when a township was divided by county lines, or contained a small population, less than 100 inhabitants. These cases are met by the proviso. From this interpretation of the section quoted from the constitution, it follows that the legislature possessed authority to pass Sp. Laws 1879, c. 236, by which twelve townships, congressional or fractional, are declared to be and to constitute the town of Moorhead, and that the chapter is not unconstitutional.

In April, 1879, two of these twelve townships were set off, leaving the town of Moorhead to consist of the remaining ten. The second important question in the case is whether the statutes permit these ten townships to be formed into one independent school-district? Gen. St. 1878, c. 36, § 94, enacts that "any city, town, village, township, or school-district,

now or hereafter organized, may be organized into and established as an independent school-district: * * * *provided, first*, that this title shall not apply to any township or school-district containing less than five hundred inhabitants, unless said school-district consists, in whole or in part, of an incorporated city, town or village: *provided, second*, that the provisions of this chapter shall not apply to any city, town or village, or any part thereof, which now has any special law regulating its schools." This section, standing alone, clearly authorizes the formation of a town consisting of any number of townships, congressional or fractional, into a single independent school-district. It is, however, contended, in behalf of the state and the relator, that it is controlled by section 17 of the same chapter, (Gen. St. 1878, c. 36.) It will be noticed that this chapter is divided into subchapters, which are noted both in the original act of 1877, and also in the General Statutes of 1878. Section 17 is found in subchapter 1, some of the provisions of which appear to be applicable to all of the three statutory classes of school-districts, to wit, common, independent and special. Other provisions are applicable to common, but not to independent, districts. As to other provisions, it is not really apparent how far their applicability extends. Section 94 is found in subchapter 7. This subchapter appears to be confined to independent school-districts. Its aim seems to have been to make all provisions in reference to such districts which occurred to the legislature to be necessary for their organization and government. Yet, for the purpose of covering any case overlooked, section 115 enacts that, "upon and after organization as herein" (i. e., in subchapter 7) "provided, any district so organizing, or heretofore so organized," (i. e., as an independent school-district,) "shall be governed by the provisions of this chapter," (i. e., subchapter 7,) "and by the general school law," (i. e., the school laws other than subchapter 7,) "not inconsistent with the special provisions of this chapter," (i. e.,

subchapter 7.) It will be observed that this section does not touch the matter of organization. It relates wholly to the *government* of independent districts *after* organization. The organization of districts under subchapter 1 is the work of the county commissioners. The organization of independent districts, under subchapter 7, is the work of the qualified electors of the proposed district. As respects the matter of organization, subchapter 7 makes no reference to any other portion of the school law. If it had been the intention that, as respects organization, subchapter 7 should, in every way, be controlled by other portions of the school law, it is reasonable to suppose that this intention would have been expressed. No such intention can be gathered from any provision of such subchapter, while the fact that as respects the matter of government after organization, reference is made to the general school law, is morally conclusive that, as respects organization, it was not the intention of the legislature to subject independent districts to the control of what is styled the general school law, but to make them, as their name implies, wholly independent thereof, and subject only to the provisions of subchapter 7.

If we are right, it follows that section 17, subchapter 1, which enacts that "any school-district hereafter organized or altered may contain the entire township, * * * or a tract of land six miles square in different townships," has no application to the organization of independent school-districts. This is the statutory provision relied upon by the state, and which is claimed to restrict the area of school-districts organized after its passage to 36 sections of land. In our opinion it does not control section 94. Under that section, a town consisting of several townships, congressional and fractional, may lawfully be formed into a single independent school-district. So far as the question of authority is concerned, it was, therefore, lawful and competent for the town of Moorhead, consisting, as it did, of ten townships,

partly congressional or full, and partly fractional, (as it is claimed,) to be formed into an independent school-district, by proceeding as in subchapter 7 provided. As to the notice of the meeting of the qualified electors, to decide upon the question of organizing the district, we are of opinion, upon the law and evidence, that it was sufficient. The matter of notice is governed by section 95, which requires the notices to "be posted in three of the most public places in the contemplated district." Gen. St. 1878, c. 10, § 113, does not apply to such a case.

These are all the matters which we feel called upon to determine, and the result is that the respondents are entitled to judgment, which will be entered accordingly.

MEYER FRANK and others vs. JOHN S. IRGENS.

July 22, 1880.

27	43
39	495
27	43
79	384

Contract—Consideration—Proof at Trial.—In an action on a contract, if, on the trial, the plaintiff is permitted, without objection, to prove the contract, and a valid consideration for it, this cures any insufficiency of the complaint in the statement of the consideration.

Same—"Value Received."—A written promise to pay money, which states that it is "for value received," shows a valid consideration.

Plaintiffs brought this action in the district court for Mower county, against the defendant as maker of the following instrument, not set forth in the complaint, but described therein as a promissory note, and alleged to have been "duly transferred to plaintiffs, who are now the owners and holders thereof:"

"\$400.

LYLE, MINN., April 1, 1878.

"On or before the 1st day of April, 1879, for value received, I promise to pay to Th. Irgens, or order, four hundred dol-

lars, with interest at the rate of 12 per cent. per annum, payable annually.

"Should any of the interest not be paid when due, it shall bear interest at the rate of 12 per cent. It is also stipulated that, should suit be commenced to enforce the collection of this note, a reasonable amount of attorney's fees shall be allowed and taxed with the costs in the cause.

"J. S. IRGENS."

The only statement of a consideration in the complaint is that the promise in the instrument sued on was "for value received."

The defendant in his answer alleged that the instrument was made and delivered without any consideration whatever, and denied any information as to the alleged transfer to plaintiffs.

At the trial before *Page, J.*, (a jury being waived,) the plaintiffs having put in evidence the instrument sued on, and having thereupon rested their case, the defendant moved for a dismissal on the ground that the complaint failed to state a cause of action. The motion was denied, and the defendant excepted. No further evidence being introduced by either party, the court ordered judgment for plaintiffs; a new trial was denied, and the defendant appealed.

Gilman & Clough, for appellant, argued that the instrument is not a promissory note, and does not import a consideration; and therefore the complaint is defective in not stating the particular consideration on which the promise was founded. 1 Chitty Pl. 293; *Woods v. North*, 84 Pa. St. 407; *First Nat. Bank v. Gay*, 63 Mo. 33.

E. O. Wheeler, for respondents, argued that the instrument is a negotiable promissory note, citing 2 Parsons Notes & Bills, 413-4; *Smith v. Silvers*, 32 Ind. 321; *Stoneman v. Pyle*, 35 Ind. 103; *Sperry v. Horr*, 32 Iowa, 184; *Gaar v. Louisville Banking Co.*, 11 Bush, (Ky.) 180.

GILFILLAN, C. J. The motion to dismiss the action, for

insufficiency of the complaint, was not made until the instrument described as the basis of the cause of action had been introduced in evidence, without objection. This, if the contract itself be valid on its face, cured the defect, if there was any, alleged against the complaint, that it did not sufficiently state a consideration for the promise sued on.

It is immaterial whether the instrument is or is not a promissory note. If it does not bear that character, it is still good as an ordinary contract. It contains a promise to pay, and admits "value received" as the consideration for the promise. It makes out, *prima facie*, a binding promise, upon a valid consideration; and its introduction on the trial entitled plaintiff to recover, unless a defence to it was shown.

Order affirmed.

J. W. McCLUNG vs. A. D. CONDIT, impleaded, etc.

July 23, 1880.

27	45
63	376
27	45
82	151

Former Judgment—Estoppel.—A former judgment, when used as evidence in a second action between the same parties, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein.

Appeal by defendant Condit from a judgment of the municipal court of St. Paul, in an action brought against him and one Radcliff.

Simonton & Reid, for appellant.

S. L. Pierce, for respondent.

CORNELL, J. The written lease upon which this action is founded is as follows:

"I have leased to A. M. Radcliff, and A. G. Manson, and A. D. Condit, the store-room in McClung's Block, in St. Paul, Minn., lately occupied by Sidney & Co., for two years, from

May 1, 1877, at four hundred dollars rent the first year, and four hundred and fifty the second year, payable in equal monthly instalments, and for the next two months from this date for twenty dollars per month, for which they are jointly and severally liable.

"St. Paul, March 1, 1877.

[Signed]

"J. W. McCLUNG."

"We accept the above lease on the terms named.

[Signed]

"A. G. MANSON.

"A. M. RADCLIFF."

The purpose of the action is to recover the instalments of rent which have accrued since May 1, 1878. The appellant, Condit, answered separately, putting in issue all the allegations of the complaint as to the execution of the lease, the entry and possession of the demised premises, and any liability on his part, joint or otherwise, upon the covenants of the lease, and also setting up the further defence of a former suit in bar, in which he claims that the question of his liability under the lease was determined in his favor.

On the trial, the record of the proceedings in such former action, which was tried by a justice of the peace, was introduced in evidence, without objection, together with proofs showing the identity of the lease sued on in both actions, and the particular matters which were actually litigated in such former action as between the plaintiff and Condit. It appears therefrom that that action was brought upon said written lease, against Condit, Radcliff, and Manson, the parties named therein as the lessees, for the recovery of the unpaid instalments of rent then claimed to be due thereon, amounting in all to \$99.50. The complaint therein alleged substantially a demise of the premises to all said parties, by said written instrument of lease, "to be occupied by them jointly," for the term therein mentioned, and for the rent therein specified, "for which they were to be jointly and severally liable," etc., and that they "agreed to accept said premises and lease in writing according to the terms thereof, and entered upon

the possession of the same pursuant to said lease," which they afterwards continued to occupy. The separate answer of Condit put in issue all these allegations of the complaint, and the precise point which was litigated between him and the plaintiff on the trial, and to which testimony was introduced, was whether Condit ever incurred any liability at all under the lease, either joint or several, by reason of any execution or acceptance of the same, or any entry or occupancy of the demised premises thereunder, jointly or otherwise. After the trial and submission of the case upon the merits, the justice rendered a decision, which he entered in his docket as follows:

"From the evidence it appears that defendant Condit is not liable, and judgment is hereby rendered against defendants Manson and Radcliff, jointly and severally, for the sum of \$99.50, and costs of suit, taxed at \$7.65.

"St. Paul, July 3, 1878.

[Signed]

"E. BURNAND,

"Justice of the Peace."

Under the issues tried, this in effect was a judgment, not only in favor of plaintiff against the defendants Manson and Radcliff for the whole amount of his claim in that action, but it was one acquitting the defendant Condit of all liability on account of such demand. It is also evident that the justice, in rendering this judgment, must necessarily have decided in Condit's favor the precise question which was litigated between him and the plaintiff in that action, as to his acceptance of the lease, and entry and occupancy of the demised premises thereunder, and also as to his liability at all upon any of the covenants it contained; for, without so deciding, he could not have rendered the judgment he did, adjudging the defendants Manson and Radcliff liable for the whole amount of the monthly instalments of rent which had then accrued and remained unpaid, and that the defendant Condit was not liable for any portion thereof. The effect of this judgment, as an estoppel, was to preclude both plaintiff

and Condit from litigating anew, in any future action between them in which it might be pleaded in bar or used as evidence, not only the question as to Condit's liability for the rents which were demanded in that action, but the further question, which was there actually contested, and was necessarily passed upon by the court, as to his liability at all under the lease.

In the present action, this last question was again directly involved in the trial of the issues made by the pleadings between the parties plaintiff and appellant, and the former judgment was conclusive evidence that appellant never became a party to the lease, by acceptance or otherwise, and that he is consequently not liable upon any of its covenants. As to plaintiff's position, that the issues in the two actions are essentially different, because of the allegation herein of a partnership between the alleged lessees in taking the lease, it is sufficient to observe, if that allegation was material and essential to the maintenance of the cause of action stated in the complaint, it was not only left wholly unsupported by any evidence in the case tending to establish the fact as against Condit, but it was disproved by the terms of the lease itself, and, therefore, the finding of the court below in respect to that matter is erroneous, and sufficient cause for a new trial. If, however, the allegation was immaterial, and a recovery might have been had notwithstanding the absence of any proof to support it, its insertion in the complaint could not affect the question as to the conclusive effect of the judgment in the former action in respect to the same matters which were therein determined, and which are now presented for adjudication in this action.

Judgment reversed.

JOSEPH D. BENNETT v. P. J. KNISS.

July 23, 1880.

Evidence of Value.—There being a question in this case as to the value of certain horses and harness at a particular time, testimony as to what their value was at a prior date, (when they were delivered to the defendant, in whose possession, so far as appeared, they continued to remain,) *held*, upon the facts of the case, to be sufficient to warrant the court in finding that the value testified to was the value of the horses and harness at the particular time mentioned.

Evidence in this case *held* sufficient to support the findings of the trial court.

Appeal by defendant from a judgment of the district court for Rock and Pipestone counties, and from an order refusing a new trial, the action having been tried before *Dickinson, J.*, without a jury.

Daniel Rohrer, for appellant.

Emory Clark and *M. B. Soule*, for respondent.

BERRY, J. The majority of the many points made in the defendant's brief are, in effect, that the finding of the trial court is, in some particulars, unsupported by the evidence. Upon a careful perusal of the paper-book, we discover no material finding of which the defendant can justly complain, upon this or any other ground. We do not deem it necessary to speak with particularity of more than one or two findings.

The defendant's contract was that, if he failed, through negligence, to do a certain thing which he agreed to do, he would deliver to plaintiff a span of horses and a harness, which he had received from plaintiff, "or its equivalent in other stock, or cash." The contract was made December 3, 1874, at which time plaintiff delivered the horses and harness to defendant. The contract was broken in October, 1875. The court below very properly held that, in consequence of his breach of contract, and his failure to return the horses and harness, or the equivalent in stock or cash, the defendant had become liable in damages for the value of the

horses and harness. The court further held, however, that, as a prerequisite to a right of action for such damages, it was necessary for the plaintiff to make a demand upon the defendant, unless such demand was waived, or it appeared that it would not have been complied with, and, therefore, would have been useless. It was also found, upon what we regard as sufficient evidence, that a formal demand was dispensed with by the conduct of the defendant.

We are inclined to the opinion that, upon defendant's breach of contract, and his failure to deliver within a reasonable time the horses and harness, or the equivalent stipulated for, his liability to respond in damages became absolute, and no demand was necessary. This, however, would be important only with reference to the time as of which the value of the horses and harness was to be estimated. If the liability of the defendant became absolute, in the manner and at the time mentioned, the value of the horses and harness should be estimated as of that time, and interest should be allowed on such value from that time. The court below was, however, of opinion that, no demand having been made, the value of the horses and harness should be estimated as of the date of the commencement of the action, in 1878, and that interest should be allowed on such value from that date. But the court having found that the value was the same at the time when the defendant's failure to deliver after a reasonable time occurred, and at the date of the commencement of this action, it will be apparent that the error (if error it was) as to the matter of demand was prejudicial only to the plaintiff—that is to say, the amount of interest which he recovered was less than he would have been entitled to recover, if a demand had been held to be wholly unnecessary. Of this the defendant, of course, cannot complain.

The only evidence of the value of the horses and harness was that of J. G. Bennett, who testified that he knew the same, and that, at the time when the contract between the plaintiff and defendant was made, and the horses and harness

delivered to the defendant, they were, in his judgment, worth \$250. Upon this testimony, the court found that their value, both at the date of the commencement of the action, and at the time of the defendant's failure to return them or their equivalent, as before mentioned, was \$250. This evidence was introduced without objection, and, as remarked by the court below, for the purpose of furnishing a basis upon which to estimate the damages to which the plaintiff was entitled. This was, perhaps, not the most satisfactory evidence conceivable, but it was received without objection, and as there is no presumption, one way or the other, as to whether there had been any change in the value of the property, and as it was (so far as appears) in the hands and possession of the defendant, who was, therefore, in a position enabling him to show that it had depreciated, (if such were the fact,) and as no evidence was introduced by him on the question of value, we are of opinion that it is sufficient to support the court's finding.

None of the other matters brought to our attention in the brief of the defendant's counsel appear to us to require special consideration in this opinion.

Judgment affirmed.

A. M. TYRER vs. S. Y. HYDE and others.

July 23, 1880.

The finding of the trial court in this case is supported by the evidence.

Appeal by defendant from a judgment of district court for Freeborn county, *Page, J.*, presiding.

Lovely & Morgan, for appellant.

Tyrer & Whytock, for respondent.

BERRY, J. Upon an examination of the briefs of counsel, and a reference to the paper-book, it appears to us that the

important questions in this case are questions of pure fact. In other words, the only important inquiry for this court is whether the finding of the court below is supported by the evidence. From our examination of the papers, we are satisfied that this inquiry must be answered in the affirmative. Judgment affirmed.*

STATE OF MINNESOTA v. J. H. GATES.

July 23, 1880.

Indictment for Seduction—"Previous Chaste Character."—An indictment for seduction, under a promise to marry, must show that the woman was of chaste character immediately previous to, and down to, the alleged seduction. It is not enough to allege that she was of chaste character previous to the promise to marry, or previous to the day on which the seduction is alleged to have been committed.

Appeal by defendant from a judgment of the district court for Freeborn county, and from an order refusing a new trial, the action having been tried before *Page, J.*, and a jury.

M. J. Severance and *J. H. Parker*, for appellant.

John A. Lovely, for the state. .

GILFILLAN, C. J. Indictment for seduction. After alleging the mutual promises of the parties to marry, the indictment states that defendant did, on the 11th day of May, 1878, under said promise, "seduce and have illicit connection with her, the said ———, and so promising to marry her, the said ———, did carnally know the said ———; she consenting and agreeing to such knowledge of her person, in the belief that said promise would be kept, and she, the said ———, being then an unmarried female, of chaste character previous to the date of said promises, and of chaste

*NOTE. *A. E. Johnson v. S. Y. Hyde et al.*

BERRY, J. This case follows *Tyrer v. Hyde*.

Judgment affirmed.

character previous to the said 11th day of May, A. D. 1878, and consented to said illicit and carnal connection only upon consideration of said promise of marriage, by reason whereof she was then and there seduced by said J. H. Gates, contrary," etc. In no other part of the indictment is the unmarried condition and the chaste character of the woman stated; and the question is, are they sufficiently stated to show a criminal offence?

As to her unmarried condition, we think, though it is not free from question, that it is sufficiently stated; for in the words "being then," immediately following the statement of the act of illicit connection, and immediately preceding the words "an unmarried woman," the word "then" must grammatically be held to refer to the time of such act, and not to the time of the promises or the date afterwards referred to. But such word "then" does not relate to nor qualify the words "of chaste character," in the clause following the statement that the woman was an unmarried woman. The time of such chaste character is fixed by the words "previous to the date of such promises," and "previous to the said 11th day of May, A. D. 1878." Under the statute this is not enough. The statute (Gen. St. 1878, c. 100, § 6,) reads: "Any unmarried man who, under promise of marriage, or any married man, who seduces and has illicit connection with any unmarried female of previous chaste character, is guilty of a felony." The woman must have been, at the time of the act of seduction, of previous chaste character; that is, she must have been of chaste character immediately previous to the act. Such character must have continued down to the time of the seduction. It is not enough that her character was chaste down to some time prior to that of the seduction, which is all this indictment alleges; for, though chaste previous to the promises to marry, she may have become unchaste after such promises, and before the act of seduction; and though chaste at all times previous to the 11th day of May, she may, on that day, and before the alleged seduction,

have become unchaste. The indictment does not state all the facts which constitute the crime of seduction. As, however, the facts well stated in it included all the elements of the offence of fornication, it may be sustained as an indictment for that offence, and under it the defendant, if convicted, may be punished for that offence.

Judgment and order denying a new trial reversed, and new trial ordered.

WILLIAM F. MASON vs. E. A. CAMPBELL.

July 23, 1880.

27	54
53	90

Compromise and Satisfaction of Debt—New Note for Balance unpaid.—C. was indebted to M. in a certain sum, which he was unable to pay, and thereupon it was agreed between them that C. should give M. his note, with two designated sureties, payable in six months, with 12 per cent. interest, for one-half of the debt, and that the note should be received in full satisfaction of the whole of the debt. The note was executed and received accordingly, and paid when due. *Held*, this was a good accord and satisfaction, and extinguished the debt. Subsequently to the payment of the note above mentioned, C. executed in M.'s favor another note, the only consideration of which was the remainder of the original debt not covered by the first note. *Held*, that the second note was without legal consideration.

Appeal by defendant from a judgment of the district court for Meeker county, *Brown, J.*, presiding.

E. A. Campbell, appellant, *pro se*.

F. Belfoy, for respondent.

BERRY, J. The defendant was indebted to the plaintiff in the sum of \$385.50 for goods sold and delivered. Being unable to pay the same, he agreed to give the plaintiff his promissory note, with two designated persons as sureties, payable in six months, with interest at 12 per cent. per annum, for one-half of said debt, and the plaintiff upon his part agreed to receive the note in full satisfaction of the whole of the

debt. The note was executed and received accordingly, and was paid when due, to wit, August 9, 1870. As was correctly held by the court below, this was a good accord and satisfaction, and extinguished the debt. *Stafford v. Bacon*, 1 Hill, 532; *Schmidt v. Ludwig*, 26 Minn. 85; 2 Dan. Neg. Inst. § 1289; 6 Wait's Act. & Def. 414. This action is brought upon a note made by defendant to plaintiff, on August 11, 1870, the only consideration of which was the remainder of the indebtedness of \$385.50, not covered by the note first mentioned. The question for us is whether this is a sufficient consideration for the note in suit. The original debt was extinguished by the accord and satisfaction. If, then, there is any consideration for the note in suit, it is at most a mere moral consideration. The general rule is that such a consideration will not support a promise. An apparent exception to this rule has been recognized in cases in which there was a precedent original consideration sufficient to sustain a promise, the right of action upon which has been suspended or barred by some positive rule of law; or, as it has been expressed, by the act of the law. In such cases, it is held that the debtor may waive the exemption given him by law, and bind himself by a new promise to pay the debt, the right of action upon which has been so barred or suspended. The case of a promise to pay a debt barred by the statute of limitations falls within this exception. But the general rule prevails where the original right of action is extinguished, not by the act of the law, but, as in the case at bar, by the voluntary act of the parties. In such case, a new promise does not revive the original debt, and is without consideration. *Shepard v. Rhodes*, 7 R. I. 470; *Stafford v. Bacon*, 1 Hill, 532; *Warren v. Whitney*, 24 Me. 561. From the application of these views to the case at bar, it follows that there was no consideration for the note in suit, and that the court below erred in its conclusion of law to the contrary.

Judgment reversed.

WILLIAM K. MILES and others v. JOHN WANN, impleaded, etc.

July 27, 1880.

Partnership—Action against Three as Partners—Judgment against Two, only.

The evidence in this case considered, and *held* to tend to prove a partnership between two of the defendants as to third persons. Where an action is brought upon a partnership liability, against a firm alleged to consist of three persons, and upon the trial it appears that one of them is not a member of the firm, but that the other two are members of it, upon proof of the alleged partnership liability, judgment may properly be entered against the firm of two members. Gen. St. 1878, c. 66, § 266.

Action against the defendants W. F. Von Deyn, Thomas L. Wann and John Wann, as partners in the firm of Von Deyn & Co., for goods sold and delivered to the firm. John Wann alone defended, denying that he was a member of the firm. At the trial in the district court for Ramsey county, before Brill, J., the plaintiffs dismissed the action as against Thomas L. Wann; and on motion of John Wann, the court dismissed the action as to him. A new trial was afterwards granted, and the defendant John Wann appealed.

Bigelow, Flandrau & Clark, for appellant.

An infant may be a partner, (Collyer on Partnership, §§ 13, 528; *Barklie v. Scott*, 1 Hudson & Brooke, 83,) and may enter into any mercantile contract; and the party contracting with him is bound to the same extent as if contracting with an adult. The contract is voidable only, and solely at the election of the infant. *Cogley v. Cushman*, 16 Minn. 397; *Dixon v. Merritt*, 21 Minn. 196; *Willard v. Stone*, 7 Cow. 22; *Fonda v. Van Horne* 15 Wend. 631; *Nightingale v. Withington*, 15 Mass. 272.

Infancy is a personal privilege, and if the infant does not plead it, and a guardian *ad litem* is appointed, judgment goes exactly as if he was an adult. Tyler on Infancy, 52, 172. No one can plead it for him, or in any way act on the assumption that he will plead it. A defendant cannot take advantage of the infancy of a codefendant, nor can a plaintiff antic-

27	56
47	576
27	56
60	336
60	421

ipate a plea of infancy, and leave out an infant defendant who would otherwise be a necessary party defendant, and if he does, he will be nonsuited. *Van Bramer v. Cooper*, 2 John. 279; *Hartness v. Thompson*, 5 John. 160; *Slocum v. Hooker*, 13 Barb. 536. T. L. Wann was, beyond doubt, a partner in the firm of Von Deyn & Co. Both John Wann and Von Deyn would have been estopped to deny that he was a partner. As such, he was a necessary party defendant, for the plaintiff sued on the joint contract of Von Deyn & Co., and in such a suit all the joint contractors must be made defendants. T. L. Wann had a right to hold the plaintiffs to their contract for the sale of these goods, and it is as much his right to be made a defendant as it would be to prosecute as plaintiff. Neither plaintiffs nor defendants can repudiate him as a contracting party, and therefore a necessary party to the suit. The principle is the same as when one of joint contractors has been discharged in bankruptcy. His discharge is a personal privilege, of which he alone can take advantage. He must be joined as a defendant, and no action can be maintained against the other joint contractors alone, for he may not choose to avail himself of this personal defence. *Bovill v. Wood*, 2 Maule & Selw. 23; *Mason v. Denison*, 15 Wend. 64; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478. And it is the right of John Wann (if a partner) and of Von Deyn, to have their copartners sued with them. Plaintiffs have no right to deprive them of contribution from their copartner.

Whether John Wann was a partner or not, the action could not be maintained against any of the joint contractors after its dismissal as to one of them, and, on such dismissal, the court was right in dismissing the action as to the others. The complaint still alleges that T. L. Wann is a partner, the proof still supports the charge; and as the debt is against defendants jointly, the recovery must be against all or none. *Irvine v. Myers*, 4 Minn. 164 (229); *Fetz v. Clark*, 7 Minn. 159 (217); *Johnson v. Lough*, 22 Minn. 203.

But John Wann never was a partner. It is absurd to say that a father cannot set up his infant son in a partnership business, without becoming a partner; and the only case exactly on the point holds precisely the contrary. See *Barklie v. Scott*, 1 Hudson & Brooke, 83, (cited in Parsons on Partnership, 147,) where a father had advanced a large sum of money for his son, and made him a partner in a firm, and reserved much more extensive powers over the affairs of the firm than John Wann did in this case, but was held not a partner.

I. V. D. Heard, for respondents.

BERRY, J. The testimony in this case fairly tended to show the following facts: John Wann, as guardian of Thomas L. Wann, his minor son, 16 years of age, executed what purport to be sealed articles of partnership between said Thomas and one Von Deyn. The business of the firm was the manufacture of brushes, in St. Paul. John Wann had no authority to act for his son in the premises, either as guardian or otherwise, and there was no evidence establishing any adoption or ratification by the son of his father's acts, either in executing the articles, or in carrying on the business. The articles required said Thomas to put \$5,000 into the capital of the concern. This was in fact put in by John Wann, out of his own means. By the eighth article of the partnership agreement, it was agreed that, in the absence of Thomas, who was in Europe, John Wann should keep the firm books; and, in the tenth article, John Wann is acknowledged to have power, as the guardian of Thomas, to represent his interest; to act for the firm the same as if Thomas were present and acting; to sign checks, draw drafts, sign notes, adjust accounts,—all in the firm name; and to receive all moneys that Thomas might be entitled to from the firm; and, generally, to have the same authority and control over the business of the firm as Thomas would have, if he were present and acting. The entire business of the firm was, in fact, conducted by Von Deyn and John Wann. All moneys drawn

out of the concern, nominally on account of Thomas, (which averaged about \$65 a month,) were drawn out by John Wann, and mingled with his private funds, without in any way keeping or attempting to keep them separate, although he remitted money to his wife, from time to time, to defray the expenses of herself and children, Thomas included.

All this goes to show that John Wann and Von Deyn established a partnership in fact, Von Deyn acting for himself, and John Wann nominally (but without any authority) for his minor son, who never ratified or adopted what was assumed to be done for him; that John Wann furnished the capital, took part in conducting the business, and drew money out of the concern, at the rate of \$65 per month, and appropriated the same to his own use. These facts go to prove that, whatever might have been John Wann's real intention, the effect of his conduct, as respected third parties, was to constitute a partnership between Von Deyn and himself, of which Thomas Wann was not a member. What would have been the effect of a ratification or adoption by Thomas of what was done by his father, we do not attempt to determine. It was very proper for the plaintiff, upon this state of the evidence, to dismiss the action as respected Thomas Wann; but as he had declared against a partnership consisting of Von Deyn, Thomas Wann and John Wann, it would have been very proper for him to have amended his complaint to correspond with the state of the proof.

According to the rule laid down in *Fetz v. Clark*, 7 Minn. 159 (217,) the complaint setting up a contract by a partnership composed of Von Deyn, Thomas Wann and John Wann, there could be no recovery, except against the partnership so constituted. Some doubt was expressed as to the propriety of the rule in *Town v. Washburn*, 14 Minn. 268, and we think the case at bar very well illustrates the injustice of its operation. If it was technically correct, it certainly did not tend to promote substantial justice. At any rate, it has been abrogated by Laws 1873, c. 67, (Gen. St. 1878, c. 66, § 266,)

which provides that "whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against all, but proves a cause of action against one or more of the defendants, judgment may be rendered against him or them against whom the cause of action is proved." *Reed v. Pixley*, 22 Minn. 540. Under this provision of statute, it would have been entirely proper to render judgment against Von Deyn and John Wann alone, as partners constituting the partnership of Von Deyn & Co., if it appeared that Thomas Wann was not a member of the partnership. The district court appears to have granted the defendant's motion to dismiss, upon the ground that John Wann was not shown to be a partner in the firm of Von Deyn & Co., and, as we conjecture, upon the rule of *Fetz v. Clark*. Upon further reflection, the court was of opinion that the evidence tended to establish that John Wann was a member of said firm, and that therefore the dismissal was wrong, and a new trial should be granted. But, without reference to the particular ground upon which the dismissal was granted, we think it was erroneous, for the reasons before assigned, and that the new trial was properly awarded.

Order affirmed.

HYPPOLYTE A. SEIGNEURET *v.* WILLIAM FAHEY.

July 27, 1880.

Occupying Claimants—Color of Title—Possession presumed to have been taken Peaceably—Good Faith in Taking Possession.—Construction of and application to this case of certain provisions of Laws 1873, c. 55, (Gen. St. 1878, c. 75, §§ 15-24,) commonly called the "Occupying Claimants' Law." A person is properly said to have color of title to lands, when he has an apparent (though not real) title to the same, founded upon a deed which purports to convey the same to him. In the absence of evidence to the contrary, a taking possession of land is presumably peaceable. Taking possession of land in good faith is taking possession in a belief that such taking is rightful.

Same—Evidence of Good Faith—Of Payment of Taxes.—The fact of such good faith may be proved directly by the testimony of the party whose good faith is to be shown. The question of good faith is one of fact, and for a jury. Upon the simple issue as to whether a party has paid taxes upon land, the receipts of the proper county treasurer are competent *prima facie* evidence of such payment.

Appeal by plaintiff from an order of the district court for Sibley county, *Macdonald, J.*, presiding, refusing a new trial. *S. & O. Kipp*, for appellant.

The tax deed, being void upon its face, and not regular, is evidence to everybody of the want of power in the officer to sell, and is a mere nullity, gives no color of title, and is not admissible in evidence for any purpose. *Madland v. Benland*, 24 Minn. 372; *Cogel v. Raph*, 24 Minn. 195; *Shillock v. Gilbert*, 23 Minn. 386; *Robson v. Osborn*, 13 Texas, 298, 307; *Waterson v. Devoe*, 18 Kans. 223; *Powell's Lessee v. Harman*, 2 Pet. 241; *Denn v. Turner*, 9 Wheat. 668.

The tax deed and quitclaim deed from Bertrang gave defendant no color of title in fee. Title in fee means the whole title. Gen. St. 1866, p. 699; Bingham on Real Estate, 190. The tax deed, being void on its face, conveyed no right, title or interest in the land to Bertrang, and his grantee, though an innocent purchaser, has no color of title. *U. S. v. Sempeyrac*, 1 Hempst. 118; S. C. 7 Pet. 222; *Oakley v. Ballard*, 1 Hempst. 475; *Polk's Lessees v. Wendall*, 5 Wheat. 293, 308; *Boone v. Chiles*, 10 Pet. 177; *Vattier v. Hinde*, 7 Pet. 271; *Gibson v. Winslow*, 46 Pa. St. 380; *Sapp v. Brown Co.*, 20 Kans. 243; *Sapp v. Morrill*, 8 Kans. 677. The grantee of the purchaser at an illegal tax sale, without notice of the illegality in the sale, stands in the shoes of his grantor, has not color of title, and is not entitled to compensation for his improvements. *McKee v. Lamberton*, 2 Watts & Serg. 107; *Hockenbury v. Snyder*, Id. 240; *Cranmer v. Hall*, 4 Watts & Serg. 36; *Miller v. Keene*, 5 Watts, 348; *Lambertson v. Hogan*, 2 Pa. St. 22.

O'Brien & Eller, for respondent.

BERRY, J. This is an action in the nature of ejectment. The plaintiff is found to be the owner in fee of the land in controversy. The links in defendant's chain of title are—*First*, a tax deed running to one Bertrang; and, *second*, a deed from Bertrang to defendant. The tax deed was irregular and void upon its face. The deed from Bertrang was founded upon the consideration of \$400, expressed therein, and in fact paid by defendant. It purported to convey the land, the words of conveyance being "grant, bargain, sell, release, and quitclaim." The defendant went into possession of the land on receiving and under the deed from Bertrang, and made improvements thereon. He claims that he is within the protection of Laws 1873, c. 55. Gen. St. 1878, c. 75, §§ 15-24.

Section 15 provides that "where any person, under color of title in fee and in good faith, has peacefully taken possession of any land for which he has given a valuable consideration, or when any person has taken possession of any land under the official deed of any person or officer empowered by law or by any court of competent jurisdiction to sell land, and such person has no actual notice of any defects invalidating such deed, and such deed is regular upon its face, neither such person nor his heirs, representatives, or assigns, shall be ejected from such land, except as hereinafter provided, until compensation is tendered him, or them, for all the improvements which he or they may have made upon said land previous to actual notice of the claim upon which the action is founded; or, in case of possession under an official deed, previous to actual notice of defects invalidating the same."

It is sufficient for the purposes of this case to state that a person is properly said to have color of title to lands when he has an apparent though not real title to the same, founded upon a deed which purports to convey them to him. 3 Washb. Real Prop. 510; Angell on Limitations, 407, note; 3 Wait's

Act. & Def. 17-18; *Hodges v. Eddy*, 38 Vt. 327; *Brooks v. Bruyn*, 35 Ill. 392; *Russell v. Erwin*, 38 Ala. 44; *Edgerton v. Bird*, 6 Wis. 527. As no person is presumed to be a wrongdoer and trespasser, a taking possession of land is presumably peaceable, in the absence of evidence to the contrary. By taking possession in good faith is meant taking possession in a belief that such taking is rightful; and upon the rule laid down in *Berkey v. Judd*, 22 Minn. 287, and *Garrett v. Mannheimer*, 24 Minn. 193, the fact of good faith may be proved directly by the testimony of the party whose good faith is to be shown. The question of good faith is one of fact, and for a jury. From an application of these views to the case, it follows that the jury were properly instructed by the court below that the deed from Bertrang, under which defendant went into possession, gave him color of title—meaning, of course, in this case, color of title in fee. As we have before seen, his taking of possession was presumably peaceable, and there was abundant evidence to warrant the verdict of the jury that the entry was in good faith. There was positive testimony going to show that, at the time when defendant received the deed from Bertrang, paid the consideration, and entered into possession, he had no actual knowledge or notice of the contents or character of the tax deed, or of its invalidity or irregularity.

The jury having found that the defendant took possession in good faith, he is, upon that and other facts above stated, clearly brought within the act of 1873, and is entitled to the value of the improvements made by him previous to actual notice of the plaintiff's claim to the land. In this case, as it does not appear that he had any such notice before the commencement of the action, he is entitled to the value of the improvements made before that time. This is what the jury have allowed him, as the verdict shows. They did not allow him for the barn built after this suit was commenced, for the verdict is confined to the value of the improvements "as stated in the answer." This, of course, could not include the barn,

which was built some months after the answer was made. We perceive no reason why it was not proper to show the value of the improvements by showing what it was worth to make them.

Upon the simple issue as to whether defendant has *paid* taxes upon the land, the tax receipts of the county treasurer were certainly competent *prima facie* evidence of such payment. Cooley on Taxation, 323, and cases cited.

This disposes of all of the positions of the plaintiff's counsel which require special comment, and the result is that the order refusing to vacate the verdict and denying a new trial is affirmed.

GEORGE H. JOHNSTON *vs.* BOARD OF COUNTY COMMISSIONERS OF
BECKER COUNTY.

July 27, 1880.

Contract by County involving Indebtedness greater than allowed by Law.—Gen. St. 1866, c. 11, § 78, provides for an annual levy on each dollar of taxable property, "as valued and entered on the grand list of taxable property," for the purpose of covering, among other things, all county expenses other than for roads, bridges, and the payment of the interest and principal of county debts, such rate as the county commissioners shall determine to be necessary, "not exceeding 10 mills on the dollar on the taxable property of the county." Section 79 provides that it shall be unlawful for the corporate authorities of any county, unless expressly authorized by law, to incur any pecuniary liability, for the payment of either the principal or interest of which, during the then current or any subsequent year, it will be necessary to levy a higher rate of tax than the maximum rate above mentioned. Section 80 provides that every contract made in contravention of the provisions of the foregoing section is utterly null and void in regard to any obligation imposed on the corporation in behalf of which such contract purports to be made. On December 7, 1872, the plaintiff, of the one part, and the board of county commissioners of Becker county, of the other, entered into a contract in writing, whereby the former agreed to build a jail for the use of the county, to be completed by July 1, 1873, the latter party agreeing to pay therefor \$1,300 in county orders, upon its com-

27	64
57	438
27	64
58	425

pletion. *Held*, 1, that the agreement to issue the county orders, if valid, was the incurring of a "pecuniary liability" on the part of the county. 2. That in considering whether a given amount of pecuniary liability could be incurred, the county board was bound to inquire whether such amount in money could be raised by a levy of 10 mills on a dollar of the taxable property of the county, as the same appeared upon the *submitting* grand list of the county, which was, in this case, the grand list made in 1872. 3. That as \$930.45 was all that could be levied on such grand list, at the rate of 10 mills on the dollar, the agreement for the building of the jail and payment therefor was void as respected the county.

Appeal by plaintiff from an order of the district court for Becker county, *Stearns, J.*, presiding, refusing a new trial.

Kerr v. Wilson, for appellant.

Cromb & Offerd and *W. P. Warner*, for respondent.

BERRY, J. Gen. St. 1866, c. 11, § 78, provides that "there shall be levied annually on each dollar of taxable property in this state, (other than such as by law is otherwise taxed,) as valued and entered on the grand list of taxable property, for the several purposes in this chapter enumerated, taxes at the rates hereafter specified, namely: all county expenses of each of the several counties other than for roads and bridges, and the payment of the interest and principal of the debts of the county, such rate as the commissioners of such county determine to be necessary, not exceeding ten mills on the dollar on the taxable property of the county."

Section 79 provides that "it shall be unlawful for the corporate authorities of any county, * * * unless specially and expressly authorized by law, to contract any debt, or incur any pecuniary liability, for the payment of either the principal or interest of which, during the then current year, or any subsequent year, it will be necessary to levy on the taxable property of such county * * * a higher rate of tax than the maximum rate prescribed by this chapter."

Section 80 provides that "every contract made in contravention of the provisions of the foregoing section is utterly null and void in regard to any obligation thereby imposed on the corporation on behalf of which such contract purports to

be made; but every commissioner, officer, agent, supervisor, or member of any municipal corporation, that makes, or participates in making, or authorizes the making of any such contract, shall be held individually liable for its performance; and every commissioner, supervisor, * * * or other officer or agent of any such municipal corporation present when any such unlawful contract was made, or authorized to be made, shall be deemed to have made, or to have participated in making, or to have authorized the making of the same, as the case may be, unless, if present, he dissented therefrom, and entered, or caused to be entered, such dissent on the records of such municipal corporation."

On December 7, 1872, the plaintiff of the one part, and the defendant of the other part, entered into a contract in writing, whereby the former agreed to build a jail for the use of the county of Becker, the same to be completed by July 1, 1873; the latter party agreeing to pay therefor the sum of \$1,300, in county orders of said county, upon completion of such jail. Nine hundred and thirty dollars and forty-five cents was all that could be levied as taxes for the year 1872, at the maximum rate of 10 mills per dollar upon the taxable property entered upon the grand list made in 1872; \$3,559.73 could be levied as taxes for the year 1873, at the maximum rate of 10 mills per dollar upon the taxable property entered upon the grand list made in 1873; so that the price agreed to be paid for the jail (\$1,300) was greater than the amount of taxes leviable in 1872, and less than the amount leviable in 1873. If this contract was valid, there can be no doubt that the defendant's agreement to issue the county orders upon the completion of the jail on or before July 1, 1873, was the incurring of a "pecuniary liability" on the part of the county. The orders, when issued, would be evidence of a debt of the county, due immediately, for the payment of which it would be necessary at some time to raise money by taxation.

The important question in the case is whether, in incurring

this "pecuniary liability" to the amount of \$1,300, the defendant board exceeded its authority under the statutory provisions before quoted. This question is to be answered by determining what grand list a board of county commissioners is required to look at, in considering whether a given sum of money can be raised by a levy of 10 mills on a dollar of the taxable property of the county. Though the statutory provisions quoted are not well expressed, we think that the general intention of the legislature is plain. The manifest purpose is to fix a definite limit, beyond which a county board shall not go, in levying taxes. Now, in order to make the limit definite, it is indispensable that the value of the taxable property of the county, upon which the taxes are to be raised, be definitely ascertainable by reference to some grand list. This necessarily requires that the grand list shall be in existence at the time when the question, how large a pecuniary liability can be incurred within the ten-mill limits, is considered and passed upon; that is to say, the grand list to which the county board must look is the subsisting grand list—the list which shows how much taxable property there is in the county at the time when the pecuniary liability is incurred. From the time when a given list becomes the subsisting grand list of the taxable property of the county, until it is superseded by a succeeding grand list, it is the grand list of the county to which the county board must look. Any other construction of the statute than this would leave the county board to speculate upon the amount of some grand list to be made in the future, the amount of which it would be absolutely impossible definitely to foresee, and would, therefore, completely thwart the manifest purpose of the legislature. It would authorize the board to charge a county with "pecuniary liability," not upon any definite standard of taxable property, but upon the mere expectation of what that standard might be at some future time.

The application of these views to this case is this: The contract in this case having been made in December, 1872,

the subsisting grand list was that made in that year. To this the board should have looked in determining how large a pecuniary liability, payable in July, 1873, for the building of a jail, as in this case, it could properly incur. As we have before seen, \$930.45 was the limit, and consequently, under the statute, the contract to incur such liability to the amount of \$1,300 was void.

Order affirmed.

FRANCIS HUOT *vs.* HENRY WISE, impleaded, etc.

August 4, 1880.

Recovery against One, in Action against Several, for enticing away Plaintiff's Wife.—In an action against several for enticing away the wife of the plaintiff, though the complaint allege a conspiracy between defendants to entice her away, a recovery may be had against one defendant, though no conspiracy or cause of action against the other defendants be proved.

Same—Wife an Incompetent Witness.—A wife may be a witness against her husband, without his consent, only in the cases specified in the statute. She cannot be in an action by him against a defendant for enticing her away, though the defence be based on alleged ill-treatment of the wife by her husband.

Same—Damages.—Damages *held* not excessive.
Evidence *held* sufficient to sustain the verdict.

Appeal by defendant Henry Wise from an order of the district court for Wabasha county, *Mitchell, J.*, presiding, refusing a new trial after verdict against him of \$1,800. Appellant was sued jointly with Elizabeth Wise and Gustave Wise, and the action was dismissed at the trial as to the last named defendants.

Brown & Steel and *Doughty & Card*, for appellant.

Stocker & Matchan and *W. J. Hahn*, for respondent.

GILFILLAN, C. J. The wrong done in this case was enticing plaintiff's wife to leave him. The conspiracy alleged is not the gist of the action, but was alleged merely to connect all

the defendants with the wrong, and to charge all with the acts of each in effecting the alleged common purpose. But the case stands like any tort alleged to have been committed jointly by two or more defendants. A recovery may be had against the one proved to be guilty, although the action may fail as to the others. Had any prejudice to the defendant as to whom the action was retained been feared from evidence admitted of the acts and declarations of those as to whom it was dismissed, the proper course was to ask the trial court to strike out that evidence, or to instruct the jury to disregard it. There was abundant evidence to support the verdict against Henry Wise. There is nothing in the evidence to indicate that the damages are excessive.

Was the plaintiff's wife a competent witness for the defendant and against her husband, he not consenting to it? For the mere fact that he testified to the relations, feelings, conduct and demeanor of himself and wife towards each other, while it would amount to consent, if his consent were required to these matters being investigated through competent proof, certainly cannot be taken as his consent to the removal of a disability to testify on the part of any witness who may be offered against him. The question is simple. Is this a case in which the husband or wife may, without consent, be a witness against the other? Upon this the statute seems conclusive. Gen. St. 1878, c. 73, § 10. " * * * A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

If this statute merely laid down the rule disabling the husband and wife from testifying for or against each other, it might be urged that it was only a statutory adoption of the

common-law rule, and that it adopted also the common-law application of the rule, including the exceptions. But it also prescribes the application of, and defines and limits the exceptions to, the rule of disability. This excludes resort to the common law to determine how far the rule shall prevail, and what cases shall be excepted from it. So it is immaterial that the common law did or did not—though we know of no well-considered case holding that it did—admit the evidence of a wife against her husband, in a case like this. The statute does not.

Judgment affirmed.

ELI B. AMES and another, Administrators, vs. RICHARD SLATER,
Administrator, and others.

August 4, 1880.

Effect of Judgment in Federal Court for a Claim against a Decedent previously disallowed by the Commissioners.—H. having died intestate, leaving real and personal property in Ramsey county, in this state, administration of his estate was committed to Slater, and commissioners were appointed to hear and adjust claims. The Commercial Bank of Kentucky, holding a claim against the estate, presented the same to the probate court for allowance, but the claim was held to be barred, under our statute, by the bank's failure to present it to the commissioners for allowance. This holding was affirmed in both the district and supreme courts. The bank then brought an action in the district court upon its claim against the administrator, and it was again held that the claim was barred by the failure to present it to the commissioners. This holding, also, was affirmed in the supreme court. Thereupon, the bank brought an action against the administrator upon its claim in the circuit court of the United States for the district of Minnesota. The proceedings in the state courts were pleaded in bar of the action, but without avail, the bank recovering a judgment of over \$20,000. *Held*, that, the action having been brought by a Kentucky corporation against a citizen of this state, the circuit court had jurisdiction of it, and of the parties to it. It therefore had power to render the judgment, and such judgment (though in the opinion of this court erroneous) is valid, and binds the administrator until reversed.

Action on Administrator's Bond—Account of Assets and Debts.—The present action is brought against the defendant, as administrator aforesaid, and his sureties, upon his administration bond, to collect the amount of a claim against the estate of H., which was allowed in favor of plaintiffs' testator by the commissioners upon the estate of H., and which the administrator was duly directed to pay in full, he having cash assets sufficient to pay in full all claims allowed against the estate, but not enough to pay such claims and the judgment aforesaid of the circuit court. *Held*, that the administrator is entitled to have an account taken of the proceeds and assets of the estate of H., and of the unpaid debts due from and payable by said estate, including said judgment, and that thereupon, upon ascertaining the percentage of indebtedness which the assets will pay, it should be adjudged that the plaintiffs recover of the administrator their ratable proportion and no more.

Plaintiffs, as administrators, with the will annexed, of Levi Butler, brought this action in the district court for Ramsey county, against Slater as principal and the other defendants as sureties on Slater's bond as administrator of one Heylin, to recover the amount of a claim of \$365.15, which had been duly presented by Butler to the commissioners on Heylin's estate, and allowed by them on December 30, 1868, when they filed their report. The complaint further alleges that the total amount of debts presented to and allowed by the commissioners was \$1,758.43; that in 1873, Slater obtained license to sell real estate of his intestate, (the other defendants becoming sureties on his sale bond,) pursuant to which, he sold and conveyed certain real estate, receiving therefor the sum of \$3,725, in cash; that on September 8, 1878, the probate court ordered Slater to pay all claims not already paid by him which had been allowed by the commissioners, with interest thereon at seven per cent. per annum from July 25, 1868; that no part of the claim of Butler had been paid, and that the defendant Slater, as administrator, has assets in his hands sufficient to pay all debts allowed against Heylin's estate, and all expenses of administration; and that plaintiffs have obtained leave to prosecute the bond.

The defendants in their answer admitted all the allegations of the complaint except that of sufficiency of assets to pay all

the debts, which they denied, and made further answer as follows:

"Further answering, the defendants aver that after the allowance of all the claims against the estate, including the claim of the said plaintiffs' decedent, and after the sale of the real estate mentioned in said complaint, and after the receipt, by the administrator, of the purchase price thereof, the Commercial Bank of Kentucky, which was then and there a creditor of said estate, whose claims had never been proved before the commissioners thereof, duly commenced an action against the said defendant Slater, as administrator of the said estate of said Heylin, deceased, in the circuit court of the United States for the district of Minnesota, and which said court had then and there full and due jurisdiction of the parties to said action; and of the subject-matter thereof. That said administrator duly appeared in said suit and defended against the same as such administrator, and that such other and further proceedings were thereafter had in said court that a judgment was thereafter duly rendered against the said defendants, as well as such administrator and against the estate which he then represented, for the sum of more than \$20,000, and which said judgment is valid, in full force, and of record, and has never been in any manner reversed or appealed from, and which said judgment now forms and is a valid and substantial claim against said estate, and for which the said administrator is liable in like manner as for other claims duly proved against said estate before the commissioners thereof."

The answer further alleges that the only assets that have ever come into the hands of the administrator, Slater, is the purchase-money of the land mentioned in the complaint; that the said judgment and the other unpaid claims due from Heylin's estate amount to more than \$30,000, and that the administrator, after paying such of the claims as he has paid, and the expenses of administration, has not in his hands more than \$700; that the estate is insolvent, and the assets

amount to less than five per cent. of the claims against it; that the administrator has always been willing and ready to pay plaintiffs' decedent, and is ready and willing to pay to them the ratable proportion of the assets in his hands to which they are entitled, and offers to permit judgment to be entered against him and the estate therefor. The defendants further pray judgment that an account be taken of the assets and debts of the estate, including the judgment in the federal court, and that plaintiffs have judgment for their ratable proportion of such assets and no more.

The plaintiffs' demurrer to the answer was sustained by *Simons, J.*, and the defendants appealed.

Davis, O'Brien & Wilson, for appellants.

The jurisdiction of the federal courts to render a judgment against an administrator, upon the demand of a citizen of another state, notwithstanding the pendency of administration by the state courts, or a bar under the state statute, is conclusively settled by repeated decisions. *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank v. Jolly's Adm'rs*, 18 How. 503; *Green's Adm'x v. Creighton*, 23 How. 90; *Payne v. Hook*, 7 Wall. 425; *Commercial Bank of Ky. v. Slater*, Dist. of Minn. (unreported.)

In the case set up in the answer, the claim of the bank was presented to the probate court with a petition that it be allowed against the estate, which was refused, and, on appeal, it was held that the claim was barred, because not presented to the commissioners within the six months limited. *Commercial Bank of Ky. v. Slater*, 21 Minn. 172. The bank then brought an action at law on the same claim, and the action was held to be barred, for the same reason. *Commercial Bank of Ky. v. Slater*, 21 Minn. 174. The bank then brought an action at law in the U. S. circuit court for Minnesota, to which suit the proceedings in the state court were pleaded in bar; but the circuit court overruled the defence, and held the administrator liable. By these proceedings the judgment

of the bank became as valid a claim against the estate as if it had been presented to the commissioners and allowed.

Woods & Babcock, for respondents, cited *Penniman Will Case*, 20 Minn. 248; *Broderick's Will*, 21 Wall. 503; *Fouvergne v. City of New Orleans*, 18 How. 470; *Bank of Alabama v. Dalton*, 9 How. 522; *Commercial Bank of Ky. v. Slater*, 21 Minn. 172, 174.

BERRY, J.* Isaiah B. Heylin having died intestate, leaving real and personal property in our county of Ramsey, administration *de bonis non* of his estate was committed by the probate court of said county to defendant Slater, and commissioners were appointed to hear and adjust claims. The Commercial Bank of Kentucky, holding a claim against the estate, presented the same to the probate court for allowance, but the claim was held to be barred by the failure to present it to the commissioners for allowance. This holding was affirmed, both in the district court and in this court. The bank also brought an action upon its claim, in the district court, against the administrator, and, upon demurrer, it was again held that the claim was barred by the failure to present it to the commissioners; and this holding was also affirmed in this court. *Commercial Bank of Ky. v. Slater*, 21 Minn. 172, 174. Thereupon the bank brought an action upon its claim, in the circuit court of the United States for the district of Minnesota, against defendant Slater, as administrator aforesaid. The proceedings in the courts of this state were pleaded in bar of the action, but without avail, the bank recovering a judgment of over \$20,000.

The action having been brought by a Kentucky corporation (which is regarded as a citizen of that state) against a citizen of this state, the circuit court had jurisdiction of it and of the parties to it. *Green's Adm'x v. Creighton*, 23 How. 90; *Union Bank v. Jolly's Adm'rs*, 18 How. 503; *Suydam v. Broadnax*, 14 Pet. 67; *Payne v. Hook*, 7 Wall. 425. Possessing this

*Cornell, J., having been of counsel, did not sit in this case.

jurisdiction, the circuit court had power to render judgment in the action, and its judgment, however erroneous, is valid until reversed. We have no doubt at all that the judgment is erroneous. When the proceedings in the courts of this state were pleaded and proved, the action should, in our opinion, have been dismissed, or judgment rendered for defendant. The result of these proceedings was a former adjudication upon the very claim upon which the action in the circuit court was founded. It was not only an adjudication upon the same claim, but by tribunals into which the bank had voluntarily and wholly of its own motion entered, and to which it had submitted its claim. If this state of facts was properly presented to the circuit court, we are at a loss to account for the judgment which was rendered against the administrator. But, whether erroneous or not, the judgment is valid as it stands, and we perceive no way in which the administrator can avoid paying it, in whole or in part, as the assets of the estate will permit.

This action is brought against the defendant, as administrator, and the sureties upon his administration bond, to collect the amount of a claim against the estate which was allowed in favor of the testator of the plaintiffs by the commissioners upon said estate, and which the administrator was duly directed by the probate court to pay in full, he having cash assets sufficient to pay in full all claims which were allowed against the estate. Such assets are not sufficient, however, to pay those claims and the judgment rendered by the circuit court. The defendants, therefore, in answer to this action, set up the proceedings and judgment in the circuit court, and asked that an account may be taken of the proceeds of Heylin's estate and the assets thereof in the hands of the administrator, and also of the unpaid debts due and payable from said estate, including said judgment, and that plaintiffs thereupon have judgment for their ratable proportion of such assets, and no more. We think that the defendants are entitled to the relief which their answer asks. Cer-

tainly, the administrator, in the absence of any misconduct of omission or commission—and none is charged—is not liable beyond the assets of the estate which he represents. The judgment of the circuit court (erroneous as we deem it to be) is, as a valid judgment against the administrator, as such entitled to its ratable share of these assets, and that share the administrator must pay, and he must be permitted to pay it out of the assets of the estate. In a case like this, where the assets are insufficient to pay the claims allowed and the judgment in full, it necessarily follows that whatever is to be paid upon the judgment must, to some extent, reduce the amounts payable on the allowed claims. In some way the administrator must be permitted to protect himself, and to have the amount of his liability determined. We can see no reason why it is not entirely proper to accomplish this in the manner proposed in the answer.

The order allowing the plaintiffs' demurrer to the answer is, accordingly, reversed.

STATE OF MINNESOTA *vs.* JAMES M. WHEELER.

August 4, 1880.

Intoxicating Liquor—Exclusive Jurisdiction of Village.—The charter of the village of Winnebago City exempts the village from the operation of the general law of the state regulating the sale of intoxicating liquors, and places that whole matter under the exclusive control of the common council of the village. No indictment under the general law will lie for selling such liquors within the village.

The defendant having been indicted in the district court for Faribault county, under Gen. St. 1878, c. 16, for selling spirituous and intoxicating liquor without license, demurred to the indictment. The demurrer was overruled by *Dickinson, J.*, who, at defendant's request, certified the case to this court.

Chas. M. Start, Attorney General, for the State.

A. C. Dunn, for defendant.

GILFILLAN, C. J. Sp. Laws 1874, c. 7, incorporated the village of Winnebago City. The first subdivision of section 1, title 2, of the act authorizes the common council "to grant license, to regulate auctions and auctioneers, groceries, taverns, and all persons vending or dealing in spirituous, vinous or fermented liquors." Section 6, title 3, provides: "The sale of intoxicating, spirituous, vinous, malt or fermented liquors, within the limits of said village, is hereby declared to be under the exclusive control of the common council of said village, and all fines imposed for violation of any ordinance regulating such traffic shall be paid into the treasury for the use thereof." And section 19 of the same title: "All previous acts or amendments thereto, which in any way conflict with the provisions of this act, are hereby repealed."

The question in the case is, do these provisions of the charter withdraw the village from the operation of the general law of the state prohibiting the sale of liquor without license? The cases of *State v. Schmail*, 25 Minn. 370; *State v. Pfeifer*, 26 Minn. 175; and *State v. Fleckenstein*, 26 Minn. 177, are cited as bearing on the point; but the language of the charters under consideration in those cases was materially different from that of the charter in this case. In neither of those cases did the charter place the sale of liquors under the exclusive control of the common council. In each, the common council was designated as the body to issue the license, which, before the passage of the charter, was, under the general law, to be issued, if at all, by the board of county commissioners; but the prohibition in the general law against selling without license was left unaffected. Here it is different. The whole matter is placed under the exclusive control of the council. It is for that body, and that body alone, to determine whether the sale of the liquors mentioned shall be entirely prohibited, or left entirely free, or permitted under license and regulation; and, if so, upon what terms and under

what regulations, and what shall be the punishment for violations. Exclusive control in the council, and the operation of the general law within the limits of the village, cannot co-exist. Exclusive control in the council necessarily shuts out any control by the general law. If the legislature meant what its language in section 6, title 3, imports—and we must hold that it did—it intended to exempt the village from the operation of any law of the state in respect to the sale of liquors. The demurrer to the indictment is well taken.

Order reversed.

CITY OF ST. PAUL vs. DANIEL MULLEN and others.

August 4, 1880.

Assessments for Local Improvements—Re-assessment.—The common council of the city of St. Paul have authority under the charter to order a re-assessment for a local improvement, where judgment on the original assessment is denied, or such assessment declared void, by reason of the contract for doing the work having been illegally let.

Same—Expenses in Addition to Cost of doing the Work.—The constitution (section 1, art. 9,) does not exclude from assessments for local improvements other items than the mere contract cost of doing the work, such as the cost of advertising, engineering, etc., if such items are a necessary expense incurred on account of the improvement.

Certain lots belonging to the defendants were assessed for the construction of a sewer on Summit avenue, in St. Paul. The assessments not being paid, the city applied for judgment against the lots. The application was opposed, on the ground that the contract for doing the work did not conform to the requirements of the charter. Thereafter the common council ordered a re-assessment of the same property, pursuant to which a re-assessment was made by the board of public works. The re-assessment was a copy of the original assessment, and both assessments included, in addition to the

contract price of the work, certain items of expenses for abstract of title, engineering, advertising for bids, assessment notices, treasurer's notice and treasurer's fees, amounting in all to \$192.08. The defendants not having paid the re-assessment on their lots, application was made by the city to the district court for Ramsey county for judgment against the property. The application was opposed by the defendants, who renewed the objections made by them on the first application. The objections were overruled by *Simons, J.*, and judgment was ordered and entered, whereupon the defendants sued out a writ of *certiorari*.

W. P. Murray, for plaintiff.

S. L. Pierce, for defendants.

GILFILLAN, C. J. There are only two objections raised in this case that we deem of sufficient importance to mention. There is nothing in any of the others. The first of these two objections is that because the contract for doing the work was not let as prescribed by the charter, it was void, and no assessment, and consequently no re-assessment, could be made to pay for the work to be done under it; that the contract having been adjudged void, upon the application for judgment upon the original assessment, there was no legal authority to make a re-assessment. Whether this is so depends, of course, on the provisions of the city charter.

By the charter of 1874, (Sp. Laws 1874, p. 73, § 60,) the common council was authorized to direct a new assessment as to any lot, where, as to such lot, judgment on the original assessment is denied, or the assessment set aside or declared void by reason of any defect or irregularity affecting the validity of the final order of the council ordering the improvement; and, without the direction of the common council, the board of public works was directed to make a new assessment as to any lot, where, as to such lot, judgment on the original assessment is denied, or the assessment set aside or declared void by reason of any defect or irregularity affecting the validity, not of such final order, but of any proceedings subse-

quent to the final order of the council ordering the improvement. There might be some question whether the language "defect or irregularity," used in this section, would include so radical a disregard of the prior provisions of the charter as the letting of the contract for the work in an illegal way. An amendment to this section 60 by Sp. Laws 1875, c. 1, § 16, authorized the common council to direct a new assessment or re-assessment when judgment is denied on the original assessment, or the assessment set aside or declared void "*for any cause whatever.*" A clause in section 17 of the amending act, which seems to be applicable to all cases of new or re-assessments, declares that "no error, or omission, or irregularity, whether jurisdictional or otherwise, shall prevent a re-assessment to the extent of the benefits conferred by such improvement when ordered by the council."

It may seem strange that, after the enactment, in preceding parts of the charter, of provisions clearly intended to protect property owners against unnecessary or improvident expenses for local improvements, the observance of those provisions should be in any case dispensed with; but the language, especially of this amendment, is so full and precise that there is no avoiding the conclusion that the legislature intended such result. The council had power to order the re-assessment in question.

The other objection is to the effect that, in ascertaining the amount to be assessed for the improvement, there was added to the contract cost of the work, certain items, such as the cost of abstract, engineering, advertising for bids, assessment notice, and treasurer's notice. This objection is based on the constitution. Section 1, art. 9, empowers the legislature to "authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation." We see nothing in this to exclude such items as are objected to, if they are a necessary expense incurred on account of the im-

provement. They are, in such case, as much a part of the cost of the improvement as the contract price of doing the work.

Judgment affirmed.

ERNEST ALBRECHT and others vs. SETH W. LONG and others.

August 4, 1880.

Sheriff and Deputy — Agreement as to Service of Process.—An arrangement between a sheriff and his deputy that the latter shall not serve process issuing from the district court, but that the same shall be served only by the sheriff personally, is of no effect so far as the public are concerned.

Priority of Execution Liens—Representations of Attorney for Creditor.—Several executions against the same defendants were placed in the hands of the sheriff personally. Subsequently, another execution in favor of other creditors, but against the same defendants, was placed in the hands of his deputy, who levied it before the other executions were levied. *Held*, that false representations by the attorney for the plaintiffs in the execution delivered to the deputy, made to him to induce him, and by which he was induced, to receive the execution and levy it at once, do not, of themselves alone, tend to make out fraud that will defeat the right gained by the prior levy of that execution.

Appeal by defendants from an order of the district court for Waseca county, *Cox, J.*, presiding, (acting for the judge of the fifth district,) refusing a new trial. A former appeal is reported, 25 Minn. 163.

B. S. Lewis, for appellants.

Lewis Brownell, for respondents.

GILFILLAN, C. J. The charge of the court in the trial below was certainly open to criticism; but if the jury found the only verdict which, upon the evidence, they could properly find, any errors in the charge were harmless. The case grows out of a race of diligence between creditors, to collect their claims against failing debtors. Long was sheriff of Waseca county. Stephenson was one of his deputies. An execution

in favor of one firm of creditors was placed in the hands of Long, for service, at ten and a half o'clock p. m. of March 19, 1877, and at two o'clock a. m. of the 20th, two other executions in favor of different creditors were placed in his hands for service. At six o'clock a. m. of the 20th, plaintiffs' execution was placed in the hands of Stephenson. All the executions were against the same debtors, and all issued from the district court. Stephenson levied plaintiffs' execution immediately upon its receipt by him, and soon afterwards Long levied those in his hands on the same property, whereupon Stephenson delivered plaintiffs' execution to Long. The sheriff sold the property levied on, applied the proceeds upon the executions in the order in which they were delivered, and, there not being enough to satisfy the first three, he returned plaintiffs' wholly unsatisfied.

As decided by this court in this case when here before, (25 Minn. 163,) the priority of levy upon plaintiffs' execution gave them the prior right to satisfaction out of the property. To avoid this, the defendants allege, or attempt to allege, that the prior levy of plaintiffs' execution was procured through fraud and false statements on the part of the attorney for plaintiffs. There is no evidence tending to show any effort or any statement by the attorney to prevent or delay the sheriff in executing the three executions placed in his hands, nor that the sheriff did, by reason of anything done or said by the attorney, delay for a moment the levy of those executions. All that can be claimed for the evidence is that it tends to show that plaintiffs' attorney, by false statements made to the deputy, induced him to receive plaintiffs' execution, and to levy it with greater promptness than he would otherwise have used.

There was evidence of a previous arrangement between the sheriff and deputy to the effect that the latter should not serve any process issuing from the district court; that all such process should be served by the sheriff in person. Defendants claim that, had this arrangement been acted on, plaintiffs'

execution would have come into the hands of the sheriff, personally, before service, and that he would have served the executions in their proper order; that the deputy was induced, by the attorney's false representations, to disregard the arrangement, and to receive, and at once, without consulting the sheriff, to levy plaintiffs' execution. Such an arrangement, even if it might bind the sheriff and deputy, could be of no effect as to third persons. A deputy sheriff, it is true, is an officer of the sheriff, appointed and removable by him, civilly responsible to him, and acting only in his name. But the deputy's powers and duties, so far as the public are concerned, are fixed by law, and cannot be varied by any agreement between him and the sheriff. Those powers and duties are vested in and imposed on him, not for the convenience of the sheriff, but of the public. Notwithstanding the arrangement, therefore, it was the duty of the deputy to receive the execution, and with all reasonable diligence to execute it. That the deputy was, by false statements, induced to do his duty in receiving the execution, and to perform his duty to levy it at once, without delay, is not in law a fraud. Deceit, not followed by what the law recognizes as a wrong, is not fraud.

The evidence did not tend to prove a fraud, and the jury were bound to find as they did. That there were errors in the charge is immaterial.

Judgment affirmed.

JOSEPH HUOT *vs.* THOMAS MCGOVERN.

August 4, 1880.

Error without Prejudice—New Trial.—Application of the rule that a new trial will not be granted on account of the erroneous admission of evidence, if it be manifest that it did not prejudice the party objecting. Evidence *held* sufficient to sustain a verdict.

Action for the value of services, the defence being that plaintiff agreed to work for his board. Trial in the district court for St. Louis county, before *Stearns, J.*, resulting in a verdict for plaintiff for \$100. A new trial was refused, and the defendant appealed.

Albert N. Seip, for appellant.

Ensign & Cash, for respondent.

GILFILLAN, C. J. The witnesses Johnson and Friedenbergh showed sufficient knowledge of the value of services, during the time claimed by plaintiff, to qualify them to testify to the value. If the plaintiff did not show himself qualified to testify to the value, yet it is manifest the admission of his evidence on that point did not prejudice defendant; for several competent witnesses, both on the part of the plaintiff and of defendant, testified to the value of or price usually paid for services of the character of those in question, and the jury have, in their verdict, allowed less than the lowest value testified to by any one on the trial.

Although the evidence, as it appears on the record, and judging of it only from the number of witnesses on each side, is very much stronger in favor of the fact as claimed by defendant than as claimed by plaintiff, we cannot, for that reason alone, set aside the verdict. It was clearly a case where the value to be given to the testimony would largely depend on the appearance and demeanor of the witnesses at the trial, which the jury could see, but we cannot. It has also been passed on by the judge who tried the cause, and he

sustains the verdict. We see no reason to doubt that the jury impartially, and according to their best judgment, considered the evidence, and found a verdict accordingly.

Order affirmed.

JAMES M. WILLIAMS vs. J. L. POMEROY, Claimant.

27	85
82	24
82	28

August 4, 1880.

Garnishment—Claimant.—Where, in garnishee proceedings, a claimant appears, and is treated by the court and parties as a party to the end of the proceedings, it is then too late to object that no formal order making him a party was entered.

Same—Motion for Judgment.—To deny a motion for judgment in garnishee proceedings, made by the plaintiff before the disclosure is closed, is not error.

Same—Assignment of Debt Garnished.—If in such proceedings a debt disclosed has been in fact assigned by the defendant to a third party before service of the garnishee summons, and that fact appears, it cannot be appropriated to payment of the plaintiff's debt, even though the garnishee defendant have no notice of the assignment.

Appeal by plaintiff from an order of the municipal court of Minneapolis, denying a motion for judgment against the Minneapolis & St. Louis Railway Co., garnishee of C. B. Russell, and ordering the discharge of the garnishee, on the ground that, prior to the service of the garnishee summons, the debt garnished had been assigned to Pomeroy, the claimant.

Chas. F. Sawyer, for appellant.

Atwater & Atwater, for garnishee.

E. J. Davenport, for claimant.

GILFILLAN, C. J. In an action against C. B. Russell, this plaintiff garnished the railroad company, and on the disclosure it appeared that the company owed for one month's services of defendant, and enough was disclosed to suggest, though not to prove, that the debt had been assigned to Pom-

eroy, whereupon the court denied a motion of plaintiff for judgment, and then, on plaintiff's motion, adjourned the future hearing to give an opportunity to plaintiff to give Pomeroy notice to appear and be joined as a party. At the adjourned day Pomeroy appeared, set forth his claim to the debt by affidavit, and asked to be made a party and to assert his claim. No formal order was made admitting him, as there ought to have been, but the court and the parties proceeded as though he had been properly admitted. He was permitted, without objection, to assert his claim by evidence, and the plaintiff treated him as a party, by inserting his name in the title in the subsequent proceedings. It is too late now to object that there was no order admitting him.

No error appears in the denial of plaintiff's motion for judgment, for it does not appear from the case that when it was made the disclosure was closed.

The court below finds as a fact, and the evidence sustains the finding, that prior to the service of the garnishee summons, the debt from the railroad company to the defendant had been assigned by the defendant to Pomeroy. That being so, of course the plaintiff could not reach it by the garnishee proceedings; for if, in fact, the debt then belonged to some one else than the defendant, and that fact appeared from the disclosure, it could not be appropriated to payment of plaintiff's claim, whether the garnishee had notice of the assignment or not.

Order affirmed.

FIRST NATIONAL BANK OF ROCHESTER vs. A. L. BENTLEY and another.

August 4, 1880.

27	87
61	498
27	87
62	64
27	87
73	235

Principal and Agent—Renewal of Note.—S. owed the plaintiff, and had endorsed to it, as security for the debt, a note of defendants, payable to his order. The note falling due, the defendants applied to him to renew it, to which he consented, and defendants thereupon executed to him a new note for the amount, principal and interest, due on the first note. He took the new note and exchanged it with plaintiff for the first note, endorsing the second to it. Plaintiff knew nothing of the renewal beyond what it might infer from the production to it of the new note. *Held*, that S. was not the agent of the plaintiff in making the renewal.

Negotiable Note—Defence of Usury.—Laws 1877, c. 15, § 3, (Gen. St. 1878, c. 23, § 4,) intends that the defence of usury may be interposed in an action on negotiable paper, only where any other defence, if it exist, might be interposed.

Same—Endorsee for Value.—An endorsee of a negotiable note transferred to him before maturity, and without notice, as security for a precedent debt, is a purchaser for value, if he surrender other securities for the debt in consideration of the transfer of the note to him.

Appeal by defendant from an order of the district court for Olmsted county, refusing a new trial after trial by *Mitchell, J.*, a jury being waived.

Chas. C. Willson, for appellant.

Start & Gove, for respondent.

GILFILLAN, C. J. Laws 1877, c. 15, (Gen. St. 1878, c. 23,) limits to 12 per cent. the rate of interest which parties may contract for. Section 3 (Gen. St. 1878, c. 23, § 4) declares all contracts and transactions wherein a greater rate is received shall be void, "except as to *bona-fide* purchasers of negotiable paper, as hereinafter provided, in good faith, for a valuable consideration, before maturity: * * * *provided, further*, that nothing herein shall be construed to prevent the purchase of negotiable mercantile paper, usurious or otherwise, for a valuable consideration, by an innocent

purchaser, free from all equities, at any price, before the maturity of the same, where there has been no intent to evade the provisions of this act, or where said purchase has not been part of the original usurious transaction. In any case, however, where the original holder of an usurious note sells the same to an innocent purchaser, the maker of said note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note."

One Stow held two notes of these defendants, and in July, 1878, endorsed and transferred one of them, with other notes, to plaintiff, as collateral security for a loan then made by plaintiff to him. In October, 1878, these two notes having become due, the defendants, supposing that Stow still held them, applied to him for a renewal and extension for a year, which he agreed to give if they would pay interest at the rate of 18 per cent. per annum. This they agreed to, and executed a new note for each of the old notes, taking for the principal of each of the new notes the principal and interest then due on the old note for which it was given, and also a third note for the excess of interest agreed on over 12 per cent. per annum on the other two notes. Each of the three notes, by its terms, bore interest at the rate of 12 per cent. per annum. Stow then exchanged with plaintiff, for the note it held as collateral, the note which defendants had executed to take it up, and endorsed and delivered the new note to it, to be held by it as collateral security for the loan instead of the old note, which plaintiff, in consideration thereof, delivered to Stow, who surrendered it to defendants. This new note is the note now in suit, and is in the usual form of a negotiable promissory note. The plaintiff knew nothing of the usurious agreement between Stow and defendants.

We do not see how it can be claimed that in this usurious transaction Stow was plaintiff's agent. It neither knew in advance what he was going to do, nor afterwards what he had done, beyond the fact that he produced to it a note of defend-

ants, which he proposed to substitute as security in the place of the note then held by it; and the note thus offered to it does not include any of the fruits of the usury, nor has it derived, nor does it now claim, any advantage from the usury. The sole question is: was the plaintiff a *bona-fide* purchaser, such as is excepted in the act from the operation of the provision declaring usurious transactions void? From the confused manner in which the statute employs terms and phrases which have always had well-settled legal signification, there is some difficulty in arriving at its precise meaning. But we think the intent was to preserve, in favor of negotiable paper, in respect to the defence created by the statute, the same privileges and immunities accorded to it at common law in respect to defences generally, and that in an action on such paper the defence of usury may be interposed only where any other defence, if it existed, might be interposed.

Whether an endorsee of negotiable paper, transferred to him before its maturity, and without notice, as collateral security for a debt, holds it free of defences on the part of the maker, depends on the sufficiency of the consideration of the transfer to him to make him a purchaser for value. If the debt is created at the time of the transfer, and upon the credit of it, there can be no question of its sufficiency. That the existence of an antecedent debt, as security for which the note is transferred, is or is not, of itself, a sufficient consideration, the authorities are not agreed. There can be no doubt, however, either on principle or authority, that the surrender of other securities for the antecedent debt is a sufficient consideration. *Goodman v. Simonds*, 20 How. 343. The plaintiff comes within this rule.

Order affirmed.

STATE OF MINNESOTA *ex rel.* Isaac Berfield *vs.* BOARD OF
COUNTY COMMISSIONERS OF McLEOD COUNTY.

August 4, 1880.

State Road—Failure of Commissioners to take Requisite Oath—Mandamus.—

Sp. Laws 1879, c. 248, appointed commissioners to survey, locate and establish a state road in the counties of Wright, McLeod and Sibley. They were required, within a specified time, to meet and make oath "that they will faithfully and impartially discharge their duties as provided by this act, and fairly and impartially assess the damage, if any, they find to be sustained by owners of land through which said road may run, and then proceed to discharge their duties." They were directed, among other things, to apportion the expenses among the several counties, and file a statement thereof in each county, and the county commissioners of each county were directed to issue the county orders for the expenses apportioned to it, and for the damages assessed to land lying within the county. The oath the commissioners took was that "we will faithfully proceed to locate and establish said state road according to the provisions of said act, and according to the best of our abilities." *Held*, that the commissioners had no authority to act until they took the oath; that the oath taken was not such as the act required, and the action of the commissioners was void; that *mandamus* will not lie to compel payment of the expenses and compensation of the commissioners until they are allowed by the county commissioners, or fixed by judgment.

Mandamus.

L. M. Brown, for relator.

A. P. Fitch and H. J. Peck, for respondent.

GILFILLAN, C. J. By Sp. Laws 1879, c. 248, the relator and others were appointed commissioners to survey, locate and establish a state road in the counties of Wright, McLeod and Sibley. The commissioners having, as they supposed, performed their duties, the relator brings the writ of *mandamus* to compel the county of McLeod to issue the county orders in payment of damages assessed to him for lands lying in that county, and of his expenses and compensation for services apportioned to that county as the act directs. Certainly, so far as it is designed to compel payment of his expenses and

compensation for his services, the statement thereof by the commissioners not being conclusive, we do not think the writ of *mandamus* will lie until after adjustment by allowance by the county commissioners, or by judgment, although, if the action of the commissioners were legal, it might be the proper remedy to compel payment of the damages for land taken, the right to and amount of which are absolutely fixed by the award of the commissioners if legal.

It is objected, to the legality of their acts, that they did not take the oath required by law. This objection must be sustained. The act, section 2, provides that the commissioners shall meet at a designated place, within sixty days after the passage of the act, and there make oath "that they will faithfully and impartially discharge their duties as provided by this act, and fairly and impartially assess the damage, if any, they find to be sustained by owners of land through which said road may run, and then proceed to discharge their duties." The commissioners had, under the act, no authority to do any of the things prescribed in the act until they took this oath. The taking it was a condition precedent to their right to act as commissioners. The oath they did take was that "we will faithfully proceed to locate and establish said state road according to the provisions of said act, and according to the best of our abilities." This is not in substance the oath required; it does not include all that is in the oath required. There are duties imposed on them by the act besides the duty to "locate and establish said state road according to the provisions of said act." For instance, they are required, after surveying, locating, and establishing the road, and filing their award of damages, to give notice, in a mode prescribed, of their assessment, to the owners of land taken, (section 9,) also to apportion the expenses to the respective counties, and file a statement thereof in each county. Section 6. While an oath taken in compliance with a statute need not generally be in the precise terms of the statute, it must contain all the

substance. This oath does not contain all the substance required. The acts of the commissioners were therefore void.

Writ quashed.

27	92
40	330
27	92
48	249
49	97
27	92
51	130
27	92
65	192
27	92
84	56
84	57

LLOYD BARBER vs. JOHN EVANS, Jr.

August 20, 1880.

Invalid Tax Sale—Lien for Purchase-Money.—A purchaser of real property at a tax sale, which proves to be invalid by reason of an illegality in the assessment of the property and the levy of the tax, acquires no lien upon the property for the amount of his purchase-money. The provisions of Gen. St. c. 11, § 142, have no application to cases of tax sales, invalid because of an invalid assessment and levy.

Appeal by plaintiff from an order of the district court for Olmsted county refusing a new trial, the action having been tried before *Mitchell, J.*, without a jury.

Lloyd Barber, appellant, *pro se*.

Start & Gove, for respondent.

CORNELL, J. Upon the findings of fact the district court decided that plaintiff was entitled to the judgment prayed for in the complaint, "upon the condition, however, that he first pay to the defendant the amount of taxes, including penalties and costs, for which the premises were sold, together with interest thereon from the date of sale." The correctness of the ruling against the validity of the defendant's claim of title under his tax deeds is not questioned by either party, but the point is made by plaintiff that the condition which was annexed to and made a part of the order for judgment was erroneous, both upon the findings of fact, and upon the competent evidence in the case.

The action is brought under the following statutory provisions, to wit: "An action may be brought by any person

in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest." (Gen. St. 1878, c. 75, § 2.) Under this statute, possession alone is sufficient to authorize a party to bring and maintain the action against any one who is claiming an adverse estate or interest in, or lien upon, the premises. *Steele v. Fish*, 2 Minn. 129 (153.)

The essential allegations of a complaint in such an action include only the fact of possession of the real property in the plaintiff, either by himself or his tenant, and the fact that the defendant is claiming some adverse estate or interest therein, or lien thereon. It is not necessary for the plaintiff, in his complaint, to anticipate or state the nature of the adverse claim, or to meet the same by any allegations in denial or avoidance. If, as in this case, the defendant admits the fact of possession in the plaintiff, and the existence of a hostile claim in himself, which he insists upon asserting, it is for him, in his answer, to disclose the nature of such claim, and the essential facts upon which he relies for its support; and thereupon a case is presented for the determination of the court, upon the pleadings and proofs to be taken, as to the validity of such claim as against the plaintiff, and as to the rights of the respective parties in respect thereto. If the claim rests upon a legal title to the property, the sole question for determination is as to the sufficiency of such title as against the plaintiff's possession, under the rules of law applicable to questions of that character. If the claim is an equitable one, equitable principles and rules must govern in its determination; and in settling the rights of the parties in respect thereto, the court may exercise its equity powers in granting whatever relief the nature of the case upon the facts may require, and upon such terms and conditions as may be necessary to do complete justice.

In this action, defendant, in his answer, claims an estate

in fee in the premises under certain tax deeds therein mentioned; and in case his tax title is held to be invalid, he claims a lien upon the property for the amount of taxes, penalty and interest which he paid upon the purchase at the tax sale, with interest thereon from the date of the purchase. As the invalidity of the alleged tax title is not disputed, the only question left for consideration concerns the existence of the alleged lien stated in the answer.

The rights of a purchaser at a tax sale which proves to be invalid and ineffectual to pass any estate in, or legal title to, the property, are such only as are given by statute. In the absence of any statute upon the subject, he acquires no lien upon the land for the amount of the purchase-money, in case his title proves fatally defective, nor has he any legal claim upon the state for the reimbursement of his money. Neither is he entitled to be subrogated to whatever rights the state may have in respect to the collection of any taxes already legally assessed against the land, or for the re-assessment and collection of such sums as the land ought equitably to pay.

To ascertain, therefore, the rights of the defendant herein, reference must be had to the statutory provisions upon the subject which were in force at the time of the tax sale at which he became a purchaser, and which are embodied in Gen. St. (1866) c. 11, §§ 142, 155. The last-named section covers cases of sales which are declared void by judgment of court, or which are void by reason of the taxes having been regularly paid prior to the sale; and it provides that in every such case the money which may have been paid upon the purchase shall be refunded to the purchaser out of the county treasury.

The other section (section 142) enacts in terms "that, upon the sale of any land or town lot for delinquent taxes, the lien which the state has thereon for taxes then due is transferred to the purchaser at such sale; and if such sale proves to be invalid on account of any irregularity in the pro-

ceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale is entitled to receive from the proprietor of such land or lot the amount of taxes, and penalty, and interest, legally due thereon, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot is bound for the payment thereof." Clearly, this section has no application to a case where the vice which affects the legality of the sale originates in some of the tax proceedings prior to those connected with the sale itself, such as an omission, on the part of an assessor, to value the property for the purposes of taxation. Its provisions are limited to cases where the taxes have been legally assessed and levied, and have become due and delinquent, but, owing to some irregularity in the proceedings connected with the making of the sales, on the part of some officer having a duty to perform in relation thereto, the sales themselves are rendered invalid. In every such case, the purchaser acquires a lien upon the property for his purchase-money, to the extent of the taxes, penalty and interest legally due against the land at the time of sale, as well as for all taxes subsequently paid thereon by him; but in no other case is he entitled to any lien under the provisions of this section.

In its findings of fact in this case, the court specifically found as follows: "That owing to various omissions and failures on the part of the assessors and other officers to conform to the statutes regarding the assessment and levy of taxes, the taxes in question for which said premises were attempted to be sold were not levied and assessed according to law; but there was no evidence tending to show that said taxes were arbitrary, unjust or vicious; but, on the contrary, it appears that they were levied in the same manner as taxes on other property were levied, and for a public purpose, and were such as the owner of the land ought equitably to have paid the state; and therefore, although not a legal, they were a colorable tax, at least, and such as the owner ought equitably to pay."

Though this finding does not specify the particular omissions and failures from which the conclusion is drawn that "the said taxes were not levied and assessed according to law," it does substantially state that they occurred in making the assessment of the property for taxation, and in the levy of the taxes thereon, and that they constituted such a substantial departure from the statute, and disregard of its provisions, as to make both the assessment and the levy wholly illegal. It follows from this conclusion that the sales in question were invalid, not alone because of irregularities in the proceedings on the part of some officer having a duty to perform in relation to the sales, but because of the errors and omissions of the assessor and other officers in making the assessment and levying the said taxes, whereby all subsequent proceedings were vitiated. The case, therefore, does not come within the provisions of section 142 above quoted, for, as there had been no valid assessment and levy, there were no taxes legally due and delinquent from the defendant on account of the land, at the time of the alleged sale.

The statement that "there was no evidence tending to show that said taxes were arbitrary, unjust or vicious," would seem to be somewhat at variance with the preceding portion of the finding; for, under our laws, the only basis of just taxation is a valid assessment of property in the first instance; and if this is wanting, or if the levy which is made is not in substantial conformity with the requirements of the statute, the tax is necessarily "unjust and vicious;" and the fact that it may have been levied for a public purpose, or that all other taxes which were levied at the same time were also levied in like manner, would make it none the less illegal.

In respect to the suggestion that the taxes in this case, though not legal, were such as the owner ought equitably to have paid to the state, it is sufficient to say that no legal or equitable liability can arise in respect to the payment of any tax not founded upon a prior valid assessment and levy made in the manner provided by law. In the absence of any such

assessment and levy, the owner has no means of ascertaining what sum he ought to pay in respect to any piece of property as his just share of the public burden; and, under the laws in force governing this case, the courts have no power to make the requisite assessment and apportionment of the tax.

Upon the findings of fact, we are of the opinion that the condition which the court below annexed to its order for judgment in favor of the plaintiff was unauthorized and erroneous, and therefore the order appealed from denying a new trial cannot be sustained. A new trial, however, is unnecessary, inasmuch as the whole case is before us, both upon the findings and all the evidence, from which it clearly appears that plaintiff is entitled to the judgment demanded in his complaint, without any condition. The conclusion of law upon the facts found, therefore, should be modified in this respect, and plaintiff be allowed to take the judgment to which he is entitled; and the case is remanded to the district court, with instructions so to modify its conclusion of law and order for judgment.

Ordered accordingly.

AMANDA GOODRICH, an Insane Person, by her Guardian, *vs.*
A. M. FLORER.

August 24, 1880.

Action to redeem from Tax Sale.—The suit authorized by Gen. St. 1873, c. 11, § 91, is one not merely to establish the right to redeem from a tax sale, but to effect a redemption. In it the court must declare what land, estate or interest the plaintiff may redeem, and how much he shall pay for that purpose.

Same—Persons under Disabilities.—Under that section the right to redeem by persons under the disabilities therein mentioned—minors, insane persons, idiots, etc.—is not suspended during the disability.

Same—What may be Redeemed.—A person entitled to redeem, under that section, can redeem only such estate or interest in the land sold as he actually owns.

27	97
h85	479
d85	480

Same—Compensation for Improvements.—An action to redeem from a tax sale, brought under that section, is an action to test the validity of title to land within Gen. St. 1878, c. 75, § 15, and following sections, providing for compensation for improvements to occupying claimants in good faith.

The plaintiff, an insane person, residing in Massachusetts, brought this action, by her duly appointed guardian, in the district court for Rice county, to redeem a tract of land in that county, which the defendant had purchased at tax sales, and of which the plaintiff claimed to own, in fee simple, an undivided one-seventh. The action was tried before *Lord, J.*, who made a finding of facts in substance as follows: The tract of land described in the complaint was duly sold for taxes theretofore levied and assessed thereon for the years 1860, 1862, 1863 and 1874, and the defendant became the purchaser and holds the title thereof, under those sales. In 1862 the land was duly offered for sale for the taxes duly levied and assessed thereon for 1861, and, being unsold for want of bidders, was forfeited to the state; and before any sale or redemption, and in July, 1864, the defendant purchased the same from the state. On February 15, 1865, the defendant received a tax deed of the land, which was duly recorded on April 19, 1865.

In the winter of 1873, the defendant went into possession of the land under his tax deed, peaceably and in good faith, and having no actual notice of any defect invalidating the deed, (which was regular on its face,) or that the land had ever belonged to a person then deceased, or that there were any heirs of such person, or that any lunatic or insane person had or claimed any interest in the land. Previous to his notice of any such matters, and in the winter of 1873, the defendant made lasting and valuable improvements on the land, and, without any such notice, has paid taxes on the land from 1864 to 1877, inclusive, except that in 1875 the land was sold for the taxes of 1874, and was bid in and purchased by defendant.

At the time the land was sold for the taxes of 1861, for which the tax deed was executed under which the defendant

took possession, the original owner of the land, one Jesse W. Goodrich, was dead, having died in 1857, and the plaintiff was one of seven heirs of said Goodrich, who were then by descent, and as such heirs, the owners of the land. The plaintiff was then, and has ever since been, an insane person.

As conclusions of law the court found that the plaintiff was entitled to redeem her undivided one-seventh part of the premises, on payment of one-seventh of the value of the improvements made by defendant thereon, and one-seventh of the amount of the taxes paid by defendant on the property, with interest; and a reference was ordered to ascertain the amount of such taxes and interest, and the value of the improvements, and the value of the use of one-seventh of the premises; and it was further ordered that, upon the filing of the referee's report, a judgment be entered declaring plaintiff's right to redeem one-seventh part of the premises, on payment of one-seventh of the aggregate amount of such taxes, improvements and interest, after deducting the value of the use of one-seventh of the premises. From this order the plaintiff appealed.

Baxter & Quinn, for appellant.

Gordon E. Cole, for respondent.

GILFILLAN, C. J. The action is under Gen. St. 1878, c. 11, § 91,—the chapter relating to taxes. Section 90 saves, to any person having an interest in land sold for taxes, a right to redeem for two years after the date of the sale. Section 91 provides that "minors, insane persons, idiots, or persons in captivity, or in any country with which the United States are at war, having an estate in or lien on lands sold for taxes, may redeem the same within two years after such disability shall cease; but in such case the right to redeem must be established in a suit for that purpose brought against the party holding the title under the sale." This suit is to be brought, not to determine merely the right to redeem, but for the purpose of effecting a redemption, and in it the court

must declare what land, estate or interest the plaintiff may redeem, and how much he shall pay for that purpose.

Redemptions within two years after sale are to be made by payment to the county treasurer, upon the auditor's certificate of the amount due; but a claim to redeem, under section 91, may not be made till many years after the sale—till the purchaser has been for years in possession, paying taxes of various kinds—and when it might be difficult, if not impossible, for the auditor to ascertain the amount due. It is evident the legislature did not intend to impose the duty on the auditor in such cases.

Defendant urges that, plaintiff's disability still continuing, and the two years mentioned in section 90 having expired, she is not entitled to redeem at this time; his argument being that the right of redemption under section 91 can be exercised only after the disability of the party shall cease, and that it is suspended, after the two years mentioned in section 90, during the period of disability. This construction would lead to so extraordinary consequences that it is impossible the legislature should have intended it. The evident intention was that the right should not be barred by mere lapse of time, where, during such time, the person might, from the existence of the disabilities mentioned, be unable to protect his interests by redeeming. The right to redeem, therefore, continues, in the cases mentioned in section 91, until two years after the removal of the disability, but is not suspended during the disability.

In this case, the plaintiff was the owner of only an undivided one-seventh of the land. She claimed the right to redeem the entire estate; but the court below decided that she could redeem only the interest that she owned. In this the court was right. Under section 90, within two years after sale, any piece or parcel of land sold may be redeemed by any one having an interest therein, however small the interest. Under section 92 any person who has or claims an in-

terest in, or lien on, an undivided estate in the land sold, may redeem such undivided estate. It is manifestly the intention of section 91 to avoid sacrificing the interests and rights of those who are supposed to be incapable of protecting them by redemption during two years from the sale, and to do this by saving to them a right of redemption until two years after the removal of the incapability. To save their interests it is necessary only that the right should be co-extensive with the interest to be preserved. For this reason we think the right to redeem saved by section 91 is the right mentioned by section 92, with the qualification that the party seeking to redeem shall actually have (not merely claim) the estate or lien by reason of which he claims to redeem.

The court below also decided that the purchaser—this defendant—having gone into possession and made improvements on the land, the action is one to which the provisions of Gen. St. 1878, c. 75, § 15, and the following sections, apply. The case certainly comes within the terms of those sections as an action to try the title to land. *Prima facie*, the certificate of sale passed to the purchaser, at the end of two years from the sale, the absolute title to the land sold. The claim of plaintiff is that the absolute title, as to an undivided one-seventh, did not pass—has not vested in defendant. The first question in the case is: what title did the purchaser get by the tax sale and lapse of the two years? What title had he when this action was commenced—an absolute or defeasible title? The trial of this question is merely a trial of title. As to the undivided one-seventh, the court below defeated defendant's claim to an absolute title. We think the sections of chapter 75, referred to, include such an action as this.

Order affirmed.

JESSE P. FARLEY vs. NORMAN W. KITTSON and others.

August 24, 1880—October 8, 1880.

Contract—Ratification—Agency—Trust.—Consideration of a certain contract, and of the rights and duties of the parties thereto. Order sustaining demurrer of one defendant affirmed, and order overruling demurrer of the other defendants reversed.

Practice—Amendment in Supreme Court.—On an appeal to this court from an order sustaining or overruling a demurrer, this court has power, upon affirming or reversing the order appealed from, to grant leave to answer or amend. But this court will rarely exercise such power, but will, as a general rule, leave it to the court below to grant or refuse leave to amend, after the case is remanded.

Plaintiff brought this action in the district court for Ramsey county, against the defendants Norman W. Kittson, James J. Hill, and the St. Paul, Minneapolis & Manitoba Railway Company, to obtain a transfer to himself of one-fifth of the capital stock of the defendant railway company, and one-fifth of all other securities and property acquired by defendants Kittson and Hill as a result of the transactions stated in the complaint. The grounds of the action against the defendants Kittson and Hill are stated in the opinion. As against the railway company, the complaint alleges, in substance, that the defendants Kittson and Hill, together with Smith and Stephen, had used the mortgage bonds bought by them in paying for the mortgaged lines of railroad at foreclosure sales, and had thereupon organized the defendant railway company, which thereafter owned and operated such lines, and all the stock in which belonged to the defendants Kittson and Hill and to Smith and Stephen.

The defendants Kittson and Hill appeal from so much of an order of the district court, *Brill, J.*, presiding, as overrules their demurrer to the complaint; and the plaintiff appeals from so much of the same order as sustains the demurrer of the railway company.

Gilman & Clough, Griffith & Knight and C. K. Davis, for plaintiff.

R. B. Galusha and Geo. B. Young, for defendants Kittson and Hill.

Bigelow, Flandrau & Clark, for the defendant railway company.

GILFILLAN, C. J. The claim of plaintiff is based on the agreement, in 1876, between him and the defendants Kittson and Hill, by which the parties to it agreed "that they would jointly undertake, for their joint, mutual, and equal interest, benefit, advantage, and profit, the purchase of" bonds issued by certain railroad companies; "that neither of them would be required to raise or furnish any funds in said enterprise, but the same could be procured from or through said Smith," (one whom Kittson represented he could procure to furnish, by way of loan, the necessary funds;) "that the said Kittson might use or give to the said Smith, or other furnishing the desired funds, a two-fifths, or 40 per cent., interest in said purchase to be made, should it become necessary to do so in borrowing or procuring the necessary funds to carry out said enterprise; but that three-fifths or 60 per cent. interest in said enterprise and undertaking should be reserved for this plaintiff and said Hill and Kittson—that is to say, one-fifth, or 20 per cent., for each—for their mutual and equal advantage, profit and protection;" and that, subject to said understanding and agreement, "the details of the negotiation for the procuring of the necessary funds, and for the purchase of the said bonds, should be principally conducted and managed by the said defendants Hill and Kittson, and such person or persons as a minority interest in said enterprise might be given to in procuring the necessary funds therefor; and that plaintiff should render such aid or assistance therein, from time to time, as should be required of him, and he be able to give."

The transaction, the fruits of which plaintiff seeks to appropriate to the foregoing agreement, is stated in the com-

plaint as follows: "That thereupon the said defendant Kittson made arrangements with, and procured, the said Donald A. Smith, in conjunction with one George Stephen, to agree to furnish and advance the funds necessary to purchase the said bonds, and carry out said enterprise, and, as plaintiff is informed and believes, the said defendant Kittson, by and with the consent of the defendant Hill, but without the knowledge or consent of the plaintiff, and in violation of the understanding and agreement in respect thereto, before mentioned, agreed with the said Smith and Stephen that they, the said Smith and Stephen, should have and hold for their own use and benefit a three-fifths or 60 per cent. interest in said undertaking and enterprise." Subsequent to this, as the complaint alleges, Smith and Stephen, aided by Hill, Kittson and plaintiff, opened and carried on negotiations for the purchase of said bonds, and, as a result of such negotiations, Smith and Stephen purchased about \$20,000,000 in amount of the bonds.

Prima facie, the arrangement with Smith and Stephen did not belong to the performance of the agreement between plaintiff and Hill and Kittson. It had no authority from the agreement to support it. It was materially different from any arrangement that agreement contemplated. Plaintiff was not bound by it under that agreement, nor could he claim the benefit of the arrangement as made under that agreement. If, without any new agreement with Hill and Kittson, he could claim the benefit of the arrangement, it could be only through a right to ratify it and a ratification of it. Of course, in ratifying it, he would have to accept it entire—its benefits with its burdens; its advantages with the disadvantages. Plaintiff does not claim any ratification. He still distinctly insists upon his right to repudiate the giving of three instead of two-fifths in the bonds to be purchased, to Smith and Stephen, so far as it may affect him.

But a more important matter is the right to ratify. Except where the principle of estoppel applies—and that is not this

case—there are two classes of cases in which one person may ratify and claim the benefit of an act done by another without his authority. One of these is where such other, in fact, assumes to do the act by his authority, or in his name or behalf, or for his advantage. The other class is where such other, in fact, assumes to act for himself, and for his own benefit, but he stands in such relation to the person claiming the right to ratify that the law inhibits his doing the act except for the benefit of the other. The first belongs to agencies; the latter to trusts. To bring the case within the first of these classes, it must appear that Hill and Kittson, in making the unauthorized arrangement with Smith and Stephen, in fact assumed to do so in behalf or for the advantage of themselves and plaintiff, or upon the authority of the agreement between them. There is no clear averment in the complaint that they did so. Its statements are entirely consistent with the fact that they intended to act, and did act, on their own behalf alone, and independently of their contract with plaintiff, and the transaction itself indicates that they acted for themselves alone. The allegation that the negotiations for the purchase of bonds were aided by plaintiff amounts to nothing on this point, for it does not appear to what extent or in what manner he aided, nor that he aided at the request, or even with the knowledge, of any of the others.

Whether the relations of Hill and Kittson with plaintiff were of such a character that they could not make the arrangement with Smith and Stephen except for his benefit, as well as their own, depends on their contract with him. That contract created a relation of confidence between the parties to it in the matter of the enterprise they agreed on. Out of it there grew a duty on the part of each to the others, with which a negotiation for money to purchase bonds, and the purchase of bonds, on his own account, might be inconsistent. Where, in such case, one acts for his own benefit, inconsistently with his duty to the others, such others may treat such acts as

done by him on their behalf. What was, in effect, the agreement, and how far did it bind each to the others, and impose a duty on him towards them in the matter of procuring money and purchasing bonds? It was not a general, unconditional agreement to prosecute, at all events, the business of purchasing the bonds. Neither of the parties was to put any of his own money into it. The purchases were to be made wholly, if at all, with money to be borrowed. A condition agreed on limited the case in which money for the enterprise was to be borrowed. It was to be borrowed only if it could be got by giving the lender an interest not exceeding two-fifths in the bonds to be purchased. Their undertaking the purchases at all, and the extent to which they should make them, if at all, was made to depend on their ability to borrow, and the amount they should be able to borrow on that condition; so that, if they should be unable to borrow money on that condition, the enterprise would fall, and their agreement come to naught. Had money been obtained, as agreed on, it would have been the duty of the party into whose hands it came to employ it as agreed on, to wit, in the purchase of bonds; and he could not have been allowed, without the assent of the others, to employ it in purchasing for himself. Also, if by reasonable efforts money could have been borrowed on the condition agreed upon, it was the duty especially of Hill and Kittson to procure it on that condition; and in neither case could any one of the parties have properly put himself, acting on his own account, in competition with the undertaking agreed on. But if the contemplated enterprise was abortive, by reason of their inability to procure the money on the agreed condition, there is no rule of law to prevent any of the parties purchasing, or borrowing money to purchase, the bonds on his own account. It is not alleged in the complaint that any money was procured, nor that any could be procured, on the condition of the contract between Hill, Kittson and plaintiff. In the absence of the fact on which the prosecution of the contemplated enterprise depended, there is nothing to show that

Kittson and Hill violated any duty to plaintiff in making, on their own behalf, the arrangement with Smith and Stephen. No ground appears, then, in the complaint, for plaintiff's claim of interest in the bonds. The order sustaining the demurrer of the railroad company defendant is affirmed. The order overruling the demurrer of the other defendants is reversed.

After the filing of the foregoing opinion, the plaintiff moved for leave to amend his complaint, and, after argument, the following opinion was filed:

By the Court. There were two separate demurrers to the complaint. The court below sustained one demurrer and overruled the other. Plaintiff appealed from the order sustaining the demurrer, and the defendants whose demurrer was overruled appealed from the order overruling their demurrer. This court affirmed the order sustaining the demurrer, and reversed the other. Plaintiff now moves this court to modify its judgment on the orders appealed from, so as to give him leave to amend his complaint in the court below.

We have no doubt of the power of this court to grant the relief asked for; but it ought to be rarely exercised. It is a matter resting in discretion,—a discretion to be guided not alone by the character of the pleadings, but also, in some instances at least, by the prior proceedings in and conduct of the cause. On such appeals as these, only the pleadings and orders come here. We ordinarily know nothing of what other proceedings have been had in the cause. The court below is supposed to know what has been done up to the decision of the demurrers. There is great reason, therefore, why the court below, when the case is remanded, and not this court, should, as a general rule, determine whether a party may have leave to answer or to amend.

Motions denied; but, as this court does not consider their merits, it will be without prejudice to any application which may be made for leave to amend in the court below.

27 108
45 184

WILLIAM H. STEVENS *vs.* WILLIAM MONTGOMERY.

August 24, 1880.

Impeachment of Verdict.—A verdict had been rendered and the jury discharged. The jurors, two days after, came into court and stated that the verdict, as rendered, was not such as they intended. *Held*, no cause for a new trial; a verdict cannot be so impeached.

Appeal by plaintiff from an order of the district court for Brown county, *Cox, J.*, presiding, refusing a new trial. The action was begun in a justice's court.

C. R. Davis, for appellant.

B. F. Webber, for respondent.

GILFILLAN, C. J. On the trial below this case was submitted to the jury, who returned a written verdict, in which they found in favor of plaintiff, and assessed his damages at \$27.50, the demand in the complaint being for \$91.84. The verdict was recorded, and, on its being read to the jury, and they asked if it was their verdict, they answered "Yes," and were then discharged. Two days after, the members of the jury came into court, and, through the foreman, stated to the court that they had intended to render a verdict for plaintiff for the amount claimed in the complaint, less the \$27.50 mentioned in their verdict, which they had intended to allow defendant as a counterclaim. For this reason plaintiff moved for a new trial, which was refused, and plaintiff appeals. The case is not distinguishable in principle from those in which it is held that a verdict cannot be impeached by the affidavits of the jurors rendering it. The new trial was correctly denied.

Order affirmed.

COUNTY OF CHISAGO vs. ST. PAUL & DULUTH RAILROAD
COMPANY.

August 24, 1880.

Appeal—Order setting aside Tax Judgment.—An order setting aside a judgment in proceedings to enforce payment of taxes, under Gen. St. 1878, c. 11, if it determine only the strict legal rights of the parties, and not merely questions of practice or discretion, is reviewable, under Gen. St. 1878, c. 86, § 8, *subd.* 3.

Tax Judgment valid, though the Land be Exempt from Taxation.—In such proceedings to enforce payment of taxes, the fact that the land against which a tax is sought to be enforced is exempted from taxation, does not affect the jurisdiction of the court in which the proceedings are brought, to try and determine the legality of the tax.

Appeal by plaintiff from an order of the district court for Chisago county, *Crosby, J.*, presiding, opening certain tax judgments, and giving defendant leave to answer.

H. N. Setzer, for appellant.

James Smith, Jr., for respondent.

GILFILLAN, C. J. After the entry of tax judgments against certain lands, and the sale of the lands, the same being bid in for the state, and the expiration of the time to redeem, the St. Paul & Duluth Railroad Company, claiming to own the lands, made an application for an order opening the judgment, and granting leave to answer and defend. The only ground for the application was that the lands were exempt from taxation. The order was granted, and from that order the appeal is brought.

The objection is made that the order is not appealable, because the proceeding to enforce payment of taxes upon real estate is not an action, and therefore the provisions of Gen. St. 1878, c. 86, § 8, relating to appeals to this court, do not apply. The proceeding is not an ordinary action, and all the proceedings, from the filing of the list to the entry of judgment, including the mode of review of the decisions of the court below, up to the entry of judgment, are specially regu-

27	100
40	519
27	109
50	2
27	109
68	362
27	109
75	452

lated by the statute. Yet it is an action. Gen. St. 1878, c. 11, § 70, which prescribes how the proceedings shall be commenced, says: "The filing of such list shall have the force and effect of filing a complaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action, and the same shall operate as notice of the pendency of such action."

As the statute regulating the proceeding does not point out any way to review orders made after the judgment, we think the provisions of chapter 86, § 8, apply, and give the right of appeal where they give it in case of similar orders in any other action. *Com'rs of Aitkin Co. v. Morrison*, 25 Minn. 295. An order setting aside a judgment, upon an application addressed to the discretion of the court, will not be reviewed unless there is an abuse of discretion. But if the order determines the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and those matters depending on the discretion or favor of the court, it involves the merits of the action, within the meaning of the third subdivision of section 8, chapter 86, and is appealable. *Barker v. Keith*, 11 Minn. 37, (65;) *Holmes v. Campbell*, 13 Minn. 66.

The only ground on which the application for the order was made was that the court had no jurisdiction of the proceedings in which the judgments were rendered, because the lands were exempt from taxation. The only mode in which the state can assert a right to tax lands, so that the claim of right may be judicially determined, is by the filing of the list. That is equivalent to the commencement of an action for the determination of such claim of right. Gen. St. 1878, c. 11, § 70. No error, irregularity or omission, prior to filing the list, affects the jurisdiction of the court. Section 73. This jurisdiction extends over the interest in the land of every person, company or corporation—of every owner, indeed—

unless where, from the character of the owner, (as, for instance, the United States,) the state cannot subject such owner to the jurisdiction of its courts in respect to lands within the state. The proceeding is in the nature of an action in which the rightfulness of the tax sought to be enforced is to be determined; the county standing as plaintiff, and asserting the rightfulness of the tax as set out in the list; all persons interested in the land, with the exception above suggested, and choosing to appear and defend, as defendants. It was never yet heard of that a court, authorized by law to try a particular class of actions or proceedings, could have no jurisdiction of a particular case within the class, on the ground merely that the claim of the party instituting the action or proceeding was not well founded. That is the very thing which the court must try. The judgments in these proceedings necessarily involve and determine that the tax appearing in the list was or was not lawfully imposed. It is the policy of the statute that every objection to the enforcement of the taxes appearing on the list filed should be litigated and decided in those proceedings. That the land is exempt, or that the tax has been paid, is a defence which must be "made to appear by answer and proofs." Section 79. The court below erred in holding that the exemption went to the jurisdiction of the court.

Order reversed.

MICHAEL FLEMING, Administrator, vs. ST. PAUL & DULUTH RAILROAD COMPANY.

August 24, 1880.

Railroads—Statute requiring Fences.—Laws 1876, c. 24, §§ 1-3, (Gen. St. 1878, c. 34, §§ 54-56,) entitled "An act to compel all railroad companies within this state to build proper cattle-guards and fences," and the amendment of section 4 of said chapter, found in Laws 1877, c. 73, (Gen. St. 1878, c. 34, § 57,) are applicable to the St. Paul & Duluth Railroad Company.

27	111
42	89

27	111
47	364
47	487

27	111
65	391

27	111
86	239

Same—Injury to Animals.—The latter portion of section 55, declaring a failure to build and maintain cattle-guards and fences an act of negligence, has reference only to the case of killing or injuring domestic animals.

Same—Injury to Employees through Failure to Fence.—Section 57 makes failure to fence, etc., negligence *per se*, and makes the company operating the road liable for all damages *to person or property* resulting therefrom, subject to such qualifications as the general rules of law impose in analogous cases. As, for instance, in the case of injury to a fireman in the employ of a railroad company in consequence of the throwing of a train from the track by running over a cow which had come upon the track, through the lack of a fence, the general liability of the company for damages under section 57 is subject to the qualification that it is competent for an employee to assume the risks of the company's service as he finds it. So that, if he enters and continues in such service, knowing that the road is not fenced, he cannot recover for an injury of the kind mentioned.

Appeal by plaintiff from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial.
Davis, O'Brien & Wilson, for appellant.

James Smith, Jr., for respondent.

BERRY, J. This is an action for the recovery of damages for the defendant's negligence in occasioning the death of plaintiff's intestate, who was a fireman in defendant's employ. The locomotive upon which he was at work was thrown from the railway track by running over a cow, which had come upon the track at a place where the road had never been fenced, and he was thereby killed, in October, 1877. The only act of negligence claimed is defendant's failure to have its road fenced "at or near the place of the accident." It was admitted that the defendant's road was not and never had been fenced in the vicinity of the accident; that both defendant and the intestate were aware of this fact for a long time before the latter was killed; and that the intestate had been engaged on the road as a fireman for more than four years. Upon this state of facts, the action was dismissed by the district court, upon defendant's motion.

As is admitted by defendant's counsel, the charter and amendments under which the defendant exists and acts, con-

tain no requirements as to fencing. The defendant, and the companies to whose franchises it has succeeded, were not embraced in Laws 1872, c. 25, § 4, and therefore do not come within the case of *Devine v. St Paul & Sioux City R. Co.*, 22 Minn. 8. To the defendant, then, Laws 1876, c. 24, §§ 1-3, (which is a re-enactment of the act of 1872,) are applicable, as is also the amendment of section 4, found in Laws 1877, c. 73. These acts now stand in Gen. St. 1878, c. 34, as sections 54 to 57, inclusive. Section 54 requires that all railroad companies in this state shall, within six months from and after the passage of this act, (March, 1876,) build, or cause to be built, good and sufficient cattle-guards at all wagon crossings, and good and substantial fences on each side of such road. Section 55 makes all railroad companies liable for domestic animals killed or injured by their negligence, and declares a failure to build and maintain cattle-guards and fences, as before provided, to be an act of negligence. Section 56 regulates the recovery of costs to be paid in actions against such companies for killing or injuring domestic animals. Section 57, which is the amendment of 1877, provides that "any company or corporation operating a line of railroad in this state, and which company or corporation has failed or neglected to fence said road, and to erect crossings and cattle-guards, and maintain such fences, crossings and cattle-guards, shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect."

We are of opinion that the latter portion of section 55, declaring a failure to build and maintain cattle-guards and fences an act of negligence, has reference only to the case of killing or injuring domestic animals. But the effect of section 57 is to make failure to fence, etc., negligence *per se*, and to make the company operating the road liable for all damages resulting therefrom. The liability is not limited to one for damages to domestic animals, but it is a liability for all damages, to person or property, which are sustained by any per-

son in consequence of such failure or neglect. *Gillam v. Sioux City & St. Paul R. Co.*, 26 Minn. 268. If a car should be thrown from the track by running upon some domestic animal, which had come upon the track in consequence of the want of a proper fence, and a passenger should be injured thereby, no reason is perceived why the company operating the road would not be liable under these provisions of statute. The contract of a common carrier with a passenger is to use the greatest care and foresight for his safety, and to avoid the slightest neglect. *McLean v. Burbank*, 11 Minn. 189 (277.) Negligence, whether in failing to fence or in any other respect, is a breach of contract. This contract liability cannot be stipulated away. *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 125.

But the contract with an employe is entirely different. While it is the duty of a railway company to its servants to provide suitable instrumentalities for the operation of its road, it is competent for the servant to assume the risk of unsuitable and inadequate instrumentalities. If the servant enters upon and continues in the service of such company, with knowledge of the unsuitableness and inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence and disregard of safety, and he assumes the risks of the service as he finds it. This is not against public policy, for while public policy is concerned for the safety of human life and limb, it will not offer a premium for negligence or recklessness, by relieving a servant who voluntarily, and with open eyes, undertakes a service under the circumstances mentioned, from the consequences of his own folly, by charging them upon his employer. One of the most effectual ways to discourage such negligence and folly, and thereby to prevent injurious consequences, both to the servant and to others upon the train, whether fellow-servants or passengers, is to throw the whole risk in such cases upon the servant himself. The power of an employe to assume the known risks of his employment, and the consequent exemp-

tion of the master from liability in such cases, is well settled in law.

We do not think it was the intention of the legislature, in section 57 before cited, to abrogate this. The design of the statute was to impose a general liability upon a company operating a railroad without a fence, subject to such qualifications as the settled rules of law impose in analogous cases. Nothing short of an explicit declaration to the contrary, or, at least, exclusive implication, would warrant a different conclusion. In harmony with this view of the statute we have held, in *Whittier v. Chicago, Mil. & St. Paul Ry. Co.*, 24 Minn. 394,—see, also, S. C. 26 Minn. 484,—with regard to Laws 1872, c. 25, § 2, which is identical with section 55, that contributory negligence on the part of the owner of cattle killed by a railway train, consisting in his assent and agreement to dispense with a fence, relieved the company from liability under that section, which declares that the failure to build and maintain a fence shall be negligence, and that the company shall be liable for domestic animals killed or injured by their negligence. We think that the chief design and effect of section 57 are to declare that the failure or neglect of a company operating a railroad to fence its road, and to erect crossings and cattle-guards, and to maintain such fences, crossings and cattle-guards, is negligence *per se*; and, as a rule of law, it would follow by inference that, for the consequences of such negligence, the company would be liable in damages to parties injured. In declaring such liability, the statute has not, however, in our opinion, intended to do more than to declare it, subject to the general rules of law in regard to liability for negligence. See *Curry v. Chicago & Northwestern Ry. Co.*, 43 Wis. 665.

Order affirmed.

DENNIS A. MORRISON and another *vs.* NATHAN G. ABBOTT and
Wife.

August 24, 1880.

Conveyance of Homestead not Voidable by Creditors.—A conveyance of his homestead by the owner thereof (his wife joining) to a third person, and by such third person to said wife, both conveyances being without valuable consideration, such owner being at the time in embarrassed and failing circumstances, and the conveyances being made for the purpose of transferring the property to the wife, so that she could hold it free from the claims of her husband's creditors, is not fraudulent or void as respects creditors of the husband to whom he was indebted at the time when the conveyances were made.

Appeal by defendants from a judgment of the district court for Hennepin county, where the action was tried before *Vanderburgh, J.*, without a jury.

E. J. Davenport, for appellants.

Albert B. Ovitt and *Arthur J. Shores*, for respondents, cited *Sumner v. Sawtelle*, 8 Minn. 272 (309); *Piper v. Johnston*, 12 Minn. 60; *Rogers v. McCauley*, 22 Minn. 384; *Currier v. Sutherland*, 54 N. H. 475, 486; *Morgan v. Potter*, 17 Hun. (N. Y.) 403; *Huey's Appeal*, 29 Pa. St. 219; *Norris v. Kidd*, 28 Ark. 485, 493; *Chambers v. Sallie*, 29 Ark. 407; *In re Graham*, 2 Biss. 449; *Pratt v. Burr*, 5 Biss. 36; *In re Dilliard*, 9 Nat. Bank Reg. 8, 13; *Riddle v. Shirley*, 5 Cal. 488; *Burtch v. Elliott*, 3 Ind. 99; 1 Am. Lead. Cas. 45.

BERRY, J. On March 14, 1877, and for several years before that date, the defendant N. G. Abbott owned and occupied as his homestead an eighty-acre tract of land, situate in the county of Hennepin. On that day, being in "embarrassed and failing circumstances financially," he caused the land to be conveyed to his co-defendant wife, by means of a deed from him and her to one McIntosh, and a deed from McIntosh to her. There was no valuable consideration for either of these conveyances, and they were made for the purpose of

transferring the property to the wife, so that she could hold it free from the claims of her husband's creditors. At the time of the conveyances, the defendant N. G. Abbott was indebted to the plaintiffs in something over \$600, upon three overdue promissory notes. Having put the notes in judgment in the district court for said county of Hennepin, the plaintiffs bring this action for the purpose of subjecting the land to levy and sale to satisfy the same.

Under our homestead law, (Gen. St. 1878, c. 68, §§ 1, 8,) the land, while owned and held as a homestead by N. G. Abbott, was not "subject to attachment, levy, or sale upon execution, or any other process issuing out of any court within this state," and the judgment recovered was not "a lien on such homestead for any purpose whatever." Under these provisions of the statute, so long as a tract of land is the homestead of a debtor, his creditors (not mortgage creditors) cannot subject it to the payment of any claims which they may hold against him, nor to any lien for the securing of such claims, either for the present or the future. It is in every respect, and absolutely, out of their reach.

Section 8 of the homestead law authorizes him to sell and convey it without subjecting it by such sale and conveyance to the claims of creditors. This authority to sell and convey is unlimited. What the purpose or motive of the sale and conveyance are is wholly immaterial. The power to sell and convey is absolute. He may sell and convey a homestead of the value of \$10,000 for a consideration of one dollar, and with the purpose and effect of putting the property in the hands of his wife or of any other person. See *Drentzer v. Bell*, 11 Wis. 119. It was thought by the learned judge below that this authority to sell and convey did not authorize a gift—that is to say, a conveyance without actual valuable consideration. We do not agree to this construction. In our opinion, the words "sell and convey" were used to denote any transfer and conveyance, for such consideration, either nom-

inal or actual, as will support a deed. Were it otherwise, it would be unaccountable that the statute has made no provision in reference to adequacy of consideration—that a homestead owner may sell and convey his homestead for a dollar paid, and cannot sell and convey it for a nominal consideration of a dollar, expressed in the deed, but not paid.

The cases of *Sumner v. Sawtelle*, 8 Minn. 272 (309) and *Rogers v. McCauley*, 22 Minn. 384, are not parallel to this. In both cases the land, the title to which the debtor had caused to be put into the hands of another person, never was his homestead, because he never had owned it. In the case of *Piper v. Johnston*, 12 Minn. 60, the judgment was, under the law then in force, a lien upon the debtor's homestead, and this lien was held to become operative and enforceable, when the debtor's homestead right was terminated by his voluntary termination of his ownership of the land constituting such homestead; that is to say, by his conveyance of it, his wife joining.

From this, our interpretation of the statute, it follows that the court below erred in holding that the conveyance by which the eighty-acre tract in question was transferred to defendant Ellen M. Abbott was fraudulent and void as respects the plaintiffs, (creditors of defendant N. G. Abbott,) and adjudging the plaintiff's judgment to be a lien thereupon, and directing the same to be sold to satisfy such judgment.

The judgment is accordingly reversed.

STATE OF MINNESOTA *vs.* A. E. MESSENGER.

August 27, 1880.

Public and Private Statutes—Highways—Compensation.—Sp. Laws 1878, c. 191, is a public and not a private law, of the passage of which the citizen and courts are bound to take notice. The enactment is not in violation of the constitutional provision that "private property shall not be taken for public use without just compensation therefor first paid or secured."

Complaint was made against the defendant, before a justice of the peace, for obstructing a public highway, known as the St. Paul and Hastings river road. The defendant, having been arrested and brought before the justice, pleaded not guilty, waived a jury trial, and was tried, convicted and sentenced. He appealed, on questions of law alone, to the district court for Dakota county, *Crosby, J.*, presiding, where the conviction was affirmed, and he thereupon appealed to this court.

At the trial before the justice, it appeared that on May 28, 1878, the defendant had built a fence across the road at a point upon his own land. It also appeared that the road had been travelled by the public and worked by the town authorities for more than twelve years, and was the same described in an act of the legislature, entitled "An act to legalize the highway known as the St. Paul and Hastings river road," approved March 2, 1878; that no compensation had ever been awarded or paid for any part of his land included in the road, and that the road was not a legal highway unless made so by that act. The defendant offered in evidence the record of a criminal proceeding against him before a justice of the peace, in July, 1876, for obstructing the same alleged road at the same point, which resulted in the acquittal of defendant. The evidence was objected to as irrelevant and immaterial,

27	119
42	304
43	322
27	119
44	303
27	119
45	169
27	119
69	59
27	119
85	446

and was excluded, and the defendant excepted. The act referred to is printed in the margin.*

John B. & W. H. Sanborn, for appellant.

Sp. Laws 1878, c. 191, is unconstitutional, because it in no way provides that compensation shall be either paid or secured to the defendant for the taking of his private property. Const. art. 1, § 13. Before the public can acquire the right, against the will of the owner, to enter upon and permanently occupy his land for public uses, the value of the property to be taken must be ascertained by some legal and proper proceeding, or, if the value thus ascertained be not paid to or received by the owner, an adequate fund must be provided from which he may, at some future time, be compensated; and there must be provided a definite and feasible mode of compelling payment. *Teick v. Com'rs of Carver County*, 11 Minn. 201 (292); *Langford v. Com'rs Ramsey County*, 16 Minn. 375; *Norton v. Peck*, 3 Wis. 723; *Robbins v. Milwaukee, etc., R. Co.*, 6 Wis. 636; *Shepardson v. Milwaukee & Beloit R. Co.*, 6 Wis. 612; *Powers v. Bears*, 12 Wis. 221; *Gard-*

*Section 1. That the highway known as the St. Paul and Hastings river road, beginning at the north line of the town of West St. Paul, and running through the town of West St. Paul, Inver Grove and into Rosemount, as far as the intersection of the Richvalley road, at the corner of sections nineteen (19) and twenty-four, (24,) township one hundred and fifteen, (115,) is hereby declared to be a legal and valid highway to all intents and purposes, retaining the same road-bed as used by the public, and repaired by the authority of said towns, for more than ten years now passed: *provided*, however, that any person claiming to be damaged by the existence of said road shall have the right, within sixty days from and after the passage of this law, to present his claim to the board of county commissioners of the county for said damages, and said board shall hear and determine the same, subject to right of appeal to the district court of the county of Dakota; and the person so appealing may do so within sixty days of the time he received notice of the decision of said board. Such appeal shall be taken by the service of a notice thereof upon the chairman or secretary of said board, and the case shall be tried in the same manner as appeals from justices' courts are tried therein.

Sec. 2. This act shall take effect and be in force from and after its passage.

per v. Newburgh, 2 John. Ch. 161; *Bloodgood v. Mohawk, etc.*, R. Co., 18 Wend. 9; *People v. Hayden*, 6 Hill, 359.

But the act in question in no way provides for any payment to defendant of the value of his land to be taken, nor does it provide any fund from which any amount shall be paid to him for the taking of his property, nor any method by which he can in any way compel payment of his damages.

The act is void because it seeks to compel the defendant, without any summons, notice or action on the part of the town, county or state seeking to take his land, to commence a litigation for his own land within sixty days after the passage of a private act, no notice of which is given to him, or be forever deprived of the use of his land. The state has not the power to compel a citizen to commence litigation for damages for the public use of his own land, without notice either of the law or of the condemnation sought, nor can it, without notice or compensation, take from him his land or its use, if he fails to commence such a litigation. And even if it had this power, it would not be permitted by the court to obtain title to or an easement over the land of a citizen in the short space of sixty days from the passage of a private act, without personal notice to the citizen.

Jasper N. Searles, for the State.

CORNELL, J. The statute whose constitutionality is brought in question in this case, though published among the Special Laws, (Sp. Laws 1878, c. 191,) is clearly a public, and not a private act. *Potter's Dwarria*, 53. Its purpose, as indicated both in the body of the act and by its title, was to legalize and establish, as a public highway, an old travelled road extending through several towns in Dakota county, which had been in use by the public for several years as a common highway; and all the provisions of the enactment are directed to that end. This fixes the character of the law as a public one, of which the courts must take judicial notice, and with the contents of which the defendant must be presumed to

have had knowledge from the time of its passage, when, according to its terms, it took effect.

It is objected that, in the enactment of this statute, the constitutional requirement that just compensation shall be first paid or secured, as a condition precedent to the exercise of the right to take private property for public use, has not been observed by the legislature. In support of this objection, the following points are made: That the tribunal designated for determining the amount of that compensation is not an impartial one; that no fund is provided and set apart for its payment, when ascertained, nor any adequate means provided for obtaining it; that the initiation of the proceedings for ascertaining the amount of such just compensation is put upon the land-owners whose property is taken for the road; that the time for instituting such proceedings is limited to sixty days after the passage of the law; that it is a private enactment, of which such land-owners are not presumed to have had any knowledge, and therefore its effect may be to deprive them of their property without compensation, and without having had any opportunity to be heard upon the question either of condemnation or compensation.

The law itself specifically locates the line of the highway, and declares it to be "a legal and valid highway to all intents and purposes, retaining the same road-bed as used by the public, and repaired by the authority of said towns [therein named] for more than ten years now past." It further provides, in terms, "that any person claiming to be damaged by the existence of said road shall have the right, within sixty days from and after the passage of this law, to present his claim to the board of county commissioners of the county for said damages, and said board shall hear and determine the same, subject to right of appeal to the district court of the county of Dakota, and the person so appealing may do so within sixty days of the time he received notice of the decision of said board. Such appeal shall be taken by the service of a notice thereof upon the chairman or secretary of said board,

and the case shall be tried in the same manner as appeals from justices' courts are tried therein." It will be observed by these provisions that the case is one in which the power of eminent domain was exercised directly by the state itself, and for a strictly public use and purpose. The passage of the law operated as an appropriation by the state of the lands over and upon which the highway was located and established. When the property of the citizen is thus taken directly by the state it is not essential to the validity of the law that it should provide for the initiation, on the part of the public, of the proceedings requisite to the determination of the just compensation to which such citizen may be entitled, nor for making payment of such compensation before the appropriation. The constitutional requirement that just compensation be first paid or secured is satisfied in such a case if, in the act making the appropriation, an impartial tribunal is provided for determining the question of compensation, to which the citizen may freely resort and be heard at any time, and if the payment of the sum to which he is entitled is made, whenever ascertained, a charge upon the public treasury, either of the state or of some municipal subdivision thereof, such as the county in which the highway is located. *Cooley's Const. Lim.* 560, and cases there cited; *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9.

The tribunal which is designated in this instance is a board of public officers, created under the general laws of the state, and acting under the obligations of an official oath. It is the same body which is invested by said laws with the general jurisdiction of laying out county roads within their county, and assessing damages occasioned thereby, and, according to the ruling in *Bruggerman v. True*, 25 Minn. 123, it is a competent and impartial tribunal for that purpose.

Their determination, however, of the question of compensation, under the present statute, is not final, but every owner of property taken for the highway may, within sixty days after

notice of such decision, appeal therefrom to the district court of the county, and have his damages assessed by a jury, and a judicial determination of his rights in respect thereto. He is not required to give any bond, but his right of appeal is absolute, and unfettered by any condition, except a reasonable limit prescribed as to the time within which he may bring it. * He is allowed to commence the proceedings before said board at pleasure, within the period of sixty days after the passage of the act, of which he is presumed to have notice, as it is a public and not a private law, as already stated. In doing this he is only required to present whatever claim for damages he thinks himself entitled to, and it thereupon becomes the duty of the board to hear and determine it as a claim against the county. Hence, whatever sum is awarded him for his compensation is awarded against the county, and the judgment on the appeal, if one is taken and tried, is also one against the county.

This is fairly implied from the law, and especially when considered in connection with the general road law of the state, which declares every highway located by state authority to be a county road, and under which all damages assessed on account of lands taken for county roads are made payable by the county interested; (Gen. St. 1878, c. 13, §§ 53-55;) for it is reasonable to suppose that, in the enactment of the statute, the legislature had in mind the General Statutes upon the subject, and that it intended to observe the general policy which they indicated. This construction is also called for by the rule that requires every statute to be so interpreted, if possible, as to promote rather than defeat the evident purpose of the legislature in its enactment.

Thus construed, the security which is provided is adequate, for it rests upon the entire taxable property of the county. Neither the character of the tribunal, nor the security contemplated by the law, is open to any valid objection. The remedy which is given to a party injured, for obtaining compensation, is also certain and adequate, and equally free from

objection, unless the time limited for the presentation of claims for damages is so unreasonably short as effectually to deprive him of any benefit from it. The power of the legislature reasonably to limit such time is undoubted; and what is a reasonable time is a question generally resting largely in the sound discretion of the legislature, in view of all the circumstances and exigencies leading to the particular enactment. *Rexford v. Knight*, 11 N. Y. 308. To justify a court in holding a law void, because it contains an unreasonable restriction as to the time in which the right of the party may be legally asserted, the time limited must be so short as under the circumstances to amount to a practical denial of the right itself. The rule is stated in the case last above cited in this language, (p. 313:) "The court must be able to say that," because of the restriction, "no substantial opportunity is afforded to the party affected to assert his rights after the passage of the law; that the unmistakable purpose and effect of the law is to cut off the right of the party, and not merely to limit the time in which he may begin to enforce it."

The present case can hardly be said to come within this rule. The mere act of presenting to the county board a claim of this character need necessarily involve but little labor, and requires but little time. If sixty days is sufficient time in which to perfect an appeal from the decision of the commissioners—and of this there is no complaint—certainly the same time is sufficient in which to prefer a claim to the board.

The case of *Langford v. Com'rs of Ramsey Co.*, 16 Minn. 375, cited by defendant, is not in point. There, the commissioners to determine the compensation were private citizens, appointed directly by the legislature. They were not required to act under the sanction of an oath; the proceedings before them were entirely *ex parte* and without notice, and no right of appeal was given from their determination to the district court. In these respects the two cases are clearly distinguishable from each other.

These views dispose of the only question which we deem of any importance in the case.

In our opinion the return of the justice, as certified by him, does not purport to contain all the evidence, and therefore the points made upon the assumption that it does need not be considered.

Judgment affirmed.

GILFILLAN, C. J., *dissenting*. I think the act in question unconstitutional, because it does not make adequate provision to pay or secure compensation to any owner of land taken for the road. The land is taken without compensation, and right to compensation is cut off unless the owner, within sixty days from the passage of the act, institute proceedings to fix the amount; and no notice is to be given him that he must move in the matter, except such as he may be assumed to have from the passage of the act. I think it is a great strain on the constitution to hold, even if the act is to be deemed a public act, and the public are presumed to have notice of it, that the mere right given the owner to secure the compensation himself, if by chance he in fact learns of the passage of the act in time to exercise the right, is securing compensation, within the spirit and meaning of that instrument. If it is, I can only say that the legislature is vested with power to practically confiscate the property of the citizen, for hundreds of acts like this might be passed, and none of the persons whose property was proposed to be taken actually know anything about it until too late. The authorities hold that acts for taking private property for public use may put the initiative in ascertaining the amount of compensation on the owner, and may also limit the time within which he shall do so, and debar him if he fail to move within the time; but I find none which decides that the time may be limited from the mere date of passage of the act, without any other notice of any kind. While it may be conceded that an act placing

the duty on the owner to institute proceedings to ascertain the compensation to be paid, and limiting the time for him to do so, may be valid, it must afford him a full opportunity to do so; and it certainly would not afford him such full opportunity without reasonable notice to him that he is required to move, and of the time within which he must move, and what he must do.

It is assumed that the act is a public statute. It is a general rule that all are conclusively presumed to know a public statute from the time it goes into effect. But I do not think this act is, or any like it can be, in all its features, a public act, of which everybody is bound to take notice. An act may be public as to some of its provisions and private as to others. *Bacon's Abr. Statutes*, F; *Anonymous*, 12 Mod. 249; *Ingram v. Foot*, Id. 611; *Dive v. Maningham*, Plowden, 60, 65. This act, so far as it proposes to establish the road, is public, for it affects alike all inhabitants within the district through which it is to pass. But, so far as it affects only an individual owner of property to be taken for the road, it is private. In the compensation to be paid him, and how its amount shall be ascertained, it interests only him, and the state, or in this case the county, which is appointed to pay it, and does not interest the people of the state at large, nor of the district through which the road is to run. Of the private provisions of the act no one is presumed to know, from the mere fact of its passage, although they may be presumed to know of its public provisions. As the act, therefore, does not of itself serve as notice to the owner of what he is to do and within what time, and it provides for no other notice, it does not furnish him a full opportunity to have the compensation ascertained; and as it purports to take his property without compensation, in case he does not have the amount ascertained, I think the act invalid.

I therefore dissent from the decision.

WINONA & SAINT PETER RAILROAD COMPANY *vs.* SAINT PAUL
& SIOUX CITY RAILROAD COMPANY.

August 27, 1880.

27	128
55	44

Land-Grant Act—Construction.—The second section of the act of congress of March 3, 1865, entitled "An act extending the time for the completion of certain railroads in the states of Minnesota and Iowa, and for other purposes," relates only to the lands granted by that act.

Same—Conflicting Grants.—Both railroad companies claim under the grant by the act of congress of March 3, 1857, entitled "An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama, to aid in the construction of a certain railroad in said state," and the defendant company claims part of the lands under a congressional grant of 1864. The line of defendant was located through the territory where the lands in controversy lie in 1859; the line of plaintiff in 1868. No valid selection of lands for indemnity purposes was made till 1872, when defendant first selected the lands in controversy for such purposes, and they were certified by the secretary of the interior to the state for defendant's line. *Held*, that the lands within the six-mile limits of plaintiff, and between the six and the fifteen-mile limits of the defendant, belong to plaintiff. The lands lying between plaintiff's six-mile and fifteen-mile limits, and between defendant's fifteen-mile and twenty-mile limits, belong to plaintiff. The lands lying between the six-mile and fifteen-mile limits of each company belong to both companies in common.

Orders not affecting Merits.—Orders and rulings of the court below, not prejudicial to the merits of the case, disregarded.

Plaintiff brought this action in the district court for Watonwan county, to restrain the defendant railroad company from applying for or receiving from the governor of the state any deed or conveyance of certain lands described in the complaint, the plaintiff also demanding to be adjudged the owner of the lands.

The plaintiff, as successor to the rights of the Transit Railroad Company, claims the lands under the act of congress, approved March 3, 1857, entitled "An act making a grant of lands to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory,

and granting public lands, in alternate sections, to the state of Alabama, to aid in the construction of a certain railroad in that state," (11 U. S. St. at Large, 195,) and under the act of the legislative assembly of the territory of Minnesota, approved May 22, 1857, to execute the trust created by said act of congress; (Laws 1857, ex. sess. c. 1;) and under the act of congress, approved March 3, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the states of Minnesota and Iowa, and for other purposes;" (13 U. S. St. at Large, 526;) and the act of congress, approved July 13, 1866, entitled "An act relating to lands granted to the state of Minnesota, to aid in constructing railroads, (14 U. S. St. at Large, 97,) and several acts of the state legislature.

The defendant, as successor of the Root River Valley & Southern Minnesota Railroad Company, in respect to one of the lines of that company and the lands and franchises appertaining thereto, claims the lands under the above-mentioned acts of 1857, and also under the act of Congress, approved May 12, 1864, entitled "An act for a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of a railroad in said state." 13 U. S. St. at Large, 72.

Under the act of congress of 1857 and the territorial act of the same year, there was granted to the Transit Railroad Company, (to whose rights the plaintiff has succeeded,) to aid in the construction of its railroad from Winona westerly by way of St. Peter to a point on the Big Sioux river south of the 45th parallel of north latitude, every alternate section of land, designated by odd numbers, for six sections in width, on each side of said road, with a provision for supplying deficiencies in the lands in place by selections of other lands within fifteen miles of the road. By the act of congress of 1865, the grant was increased from six sections to ten sections per mile, and the limits for selection of indemnity lands were enlarged from fifteen miles to twenty miles.

By the same congressional and territorial acts of 1857, a grant precisely the same in its extent and conditions with that to the Transit Railroad Company was made to the Root River Valley & Southern Minnesota Railroad Company to aid in the construction of its railroad from St. Paul, and from St. Anthony *via* Minneapolis, to a point of junction at Shakopee in Scott county, and thence *via* St. Peter to the southern boundary of the territory, in the direction of the mouth of the Big Sioux river. By the congressional act of May 12, 1864, above-mentioned, and an act of the legislature of March 2, 1865, (Laws 1865, c. 15,) there was granted to the Minnesota Valley Railroad Company, (which had succeeded to the rights of the Root River Valley & Southern Minnesota Railroad Company,) to aid in the construction of the above-described road, four additional sections per mile, to be selected under the same conditions as in the original act of 1857: "*provided*, that the land so to be located by virtue of this section may be selected within twenty miles of the line of said road." The defendant is the same company as the Minnesota Valley Railroad Company, the change of name having been made under authority of an act of the legislature.

The plaintiff's and defendant's lines cross each other at St. Peter, beyond which point the lands in controversy are situated. The defendant located its line past these lands in 1859, the plaintiff in 1868. The first selection of them was made in 1872, for the defendant, and they were certified to the state for its line. The situation of the lands, in respect to their distance from the lines of the respective parties, is stated in the opinion.

The action was tried in Blue Earth county, by *Dickinson, J.*, upon whose findings a judgment was entered for plaintiff, and the defendant appealed. The case was argued at the April term, 1879, and, by order of the court, was reargued at the April term, 1880.

E. C. Palmer, for appellant.

Thomas Wilson, for respondent.

GILFILLAN, C. J. The defendant makes a great many exceptions to orders and rulings of the court below on matters of practice or upon evidence offered at the trial. We see none that affect the material facts of the case, and as it is evident that these orders and rulings did not prejudice the defendant in any way, we pass over them and come to the merits. Defendant claims that the act of March 3, 1865, (13 U. S. St. at Large, 526,) increasing the grant for the lines mentioned in the act of March 3, 1857, (11 U. S. St. at Large, 195,) from six to ten sections per mile, also changed that act so that no land can become attached to the grant until it shall be indicated for the particular line by the secretary of the interior, and that, as none of these lands have been so indicated for the plaintiff's line, none of them have become subject to its grant. We think section 2 of the act of 1865, which is claimed to have this effect, relates only to the selection of lands granted by that act, and was not intended to take away the company's right to ascertain and identify the lands granted by the act of 1857, in the mode in that act prescribed.

The lands in controversy were all certified by the secretary of interior for the line of the defendant. The defendant's line was located through the territory where the lands in controversy lie, in 1859; the plaintiff's, in 1868. Until 1872 there was no selection of indemnity lands through this territory on behalf of either line. They were then selected first on behalf of defendant's line. What is claimed as a selection in 1858 had no validity, for it does not appear ever to have been communicated or known to, or approved or acted on as a selection by, the secretary of the interior. As found by the court below, the lands in controversy may, for the decision of the case, be divided into four classes: *First*, those lying without the six, but within the fifteen-mile limits of defendant, and within the six-mile limits of plaintiff; *second*, those lying without the six-mile limits of each company, within the fifteen-mile limits of plaintiff, and with-

out the fifteen, but within the twenty-mile, limits of defendant; *third*, the south half of the south half of section 3, town 107, range 35, which lies without the six, but within the fifteen-mile limits of each line; *fourth*, the north-east quarter of section 17, town 107, range 40, which lies without the fifteen-mile limits of each line, but within the twenty-mile limits of defendant's line.

As to the first of these classes—to wit, the lands within plaintiff's six-mile limits—the members of the court are agreed in the result, to wit, that plaintiff is entitled to them, but arrive at such result upon diverse reasons. As to the second class, plaintiff's claim to them, under the grant of 1857, is superior to defendant's claim under the grant of 1864, (and it has no other claim to them,) and the plaintiff is entitled to them. As to the third class, the majority of the court are of opinion that the rights of the plaintiff and defendant are equal, and they are entitled to hold the land in that class in common. As to the land in the fourth class, the defendant is entitled to it. The result as to all accords with the decision of the court below.

Judgment affirmed.

J. H. CORNELL v. ELIHU SMITH.

August 30, 1880.

27	132
52	73
53	195

Usury—Voluntary Payment.—The rule laid down in *Woolfolk v. Bird*, 22 Minn. 341, as to the effect of a voluntary payment of interest in excess of what the debtor is under obligation to pay, but which he chooses to make, with full knowledge of the facts, followed and applied to the facts of this case.

Plaintiff brought this action in the district court for Nobles county, to recover possession of personal property mortgaged by him to defendant, and taken by the latter from plaintiff's possession, under a power given by the mortgage. The com-

plaint alleges the origin, nature and history of the mortgage debt, and pleads a tender of the amount remaining due on the mortgage, after crediting on the principal of the debt the amount of interest in excess of twelve per cent. paid thereon from time to time by plaintiff, and a tender of the amount of defendant's expenses, etc.

At the trial before *Dickinson, J.*, it appeared that the interest payments in question had been voluntarily made by plaintiff as payments of interest at a rate previously agreed upon, in excess of twelve per cent., and had been applied as such by the defendant. All the payments were made prior to the passage of the usury law of 1877. Upon these facts the court held the tender insufficient in amount, and ordered judgment for defendant; a new trial was denied, and the plaintiff appealed.

Daniel Rohrer, for appellant.

Clark & Soule and *M. J. Severance*, for respondent.

CORNELL, J. In *Woolfolk v. Bird*, 22 Minn. 341, this court, in construing the provisions of Gen. St. (1866) c. 23, § 1, as applicable to the facts of that case, laid down the rule that a voluntary payment of interest, computed at a rate per cent. exceeding what may be lawfully contracted for by the parties under the statute, stands upon the same footing as any other payment of money by a party under no legal obligation to make it, but which is made voluntarily, and with full knowledge of all the facts. The reason for the rule is that, as the statutes then in force upon the subject of interest contained no prohibitions or penalties against paying, receiving or contracting for any rate of interest, but simply provided that no contract for a greater rate than twelve per cent. per annum shall be valid for the excess over that rate, the public policy indicated thereby only "prevents a recovery by the creditor of the excess stipulated for; but it does not require that the debtor shall be disabled to pay such excess, or to give away his money, if he chooses to make that use of it." Hence, no distinction exists between a voluntary payment, made on ac-

count of unlawful interest, and one made upon any other invalid demand, which the party may or may not pay, as he chooses, without violating any rule of law or public policy. This rule was followed in the recent case of *Taylor v. Burgess*, 26 Minn. 547, and no reason is perceived why it is not decisive of the case at bar.

The suggestion of appellant that this case differs from that in *Woolfolk v. Bird*, in that here the appellant debtor, who has paid, in discharge and satisfaction of the lawful interest upon his demand, more than he was obligated to pay, is seeking a re-application of such excess in reduction of the amount due upon that demand, whereas in that case the amount of the excess was sought to be made the basis of a counterclaim to a different cause of action than the one which arose out of the transaction itself, is of no importance, for in either case the result sought by the debtor is a recovery, to his own use, of money which has been voluntarily paid and applied, and the right of recovery is dependent, not upon the manner of its assertion, or the nature of the action in which it is set up, but solely upon the question as to the voluntary character of the payment. Upon the findings of fact in this case that question is settled in favor of the defendant, and hence the judgment of the district court must be affirmed.

27 184
42 956

PATRICK McABE vs. NATHANIEL R. THOMPSON.

August 30, 1880.

Exemption of Stock in Trade from Levy.—Unfinished burial cases and caskets, upon which additional labor, expense and material must be put before they can be deemed finished, or fit for sale and use, when owned and held by a manufacturer for the purpose of being so finished and made fit for use by him, constitute, in part, his "stock in trade," within the meaning of that phrase as it is used in the exemption law, (Gen. St. c. 66, § 279, subd. 8,) and they are exempt from sale on execution within the limits prescribed by that statute as to value.

Same—Failure to claim Exemption.—A mere failure to claim a right of exemption at the time of a levy upon exempt personal property, no prejudice being shown as resulting therefrom, will not preclude a party from asserting the right afterwards, and before the sale.

Same—Disclaimer of Title by Debtor.—A disclaimer by the debtor of any ownership of the property levied on will not estop him from afterwards asserting and proving his title thereto as owner, when the disclaimer has not influenced the conduct of the officer, or been acted on by him or the plaintiff in the execution.

Appeal by defendant from an order of the municipal court of Minneapolis, refusing a new trial.

Geo. R. Robinson, for appellant.

Bradish & Dunn, for respondent.

CORNELL, J. The statute (Gen. St. c. 66, § 279, sub. 8) which exempts "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade not exceeding \$400 in value," was intended to include within its benefits not only "mechanics and miners," but all other persons engaged in any trade or business requiring, to carry it on, the use of tools and implements, and who gain a livelihood, in whole or in part, by such use. *Grimes v. Bryne*, 2 Minn. 72 (89.) Besides the tools and implements which every such person may hold as exempt under this statute, he is also entitled to hold, in addition thereto, his "stock in trade," within the limits specified as to value. This refers to the stock of materials belonging to the owner of the tools and implements, and which he has provided and holds for the purpose of enabling him to make their use a beneficial or profitable one as a means of support. It includes all the materials got and held for that purpose, in whatever condition or state of preparation for use they may be, so that they are suitable and adapted to the end in view, and to the particular business in which he is engaged, wherein the use of such tools is necessary. *Grimes v. Bryne*, *supra*.

The respondent here, as shown by the findings, which are reasonably supported by the evidence, was a manufacturer,

engaged in the business of buying burial cases and caskets—which were in an unfinished condition, but which were so far advanced in the process of manufacture as to be ready for the trimmings on the outside and the lining on the inside—and finishing them himself by his own work and labor, and the addition of such other materials as were necessary to fit them for sale and use. It is found as a fact that this additional work, labor and material were necessary in order to finish them, and to fit them for sale and use; and the uncontradicted evidence shows that they would thereby be enhanced in value about two-thirds. The property which is the subject of this action, and which it is claimed was exempt, consisted of several of these incomplete and unfinished burial cases and caskets, which the respondent had thus bought and was holding for the sole purpose of so finishing and fitting them for sale and use. They constituted as much a part of his stock in trade, within the meaning of the statute, liberally construed, as it must be, as did the screws, nails, trimmings and lining which were used in completing or finishing them. Within the principle of the case above cited, respondent belonged to the class of persons for whose benefit the statutory exemption was intended, and he was entitled to hold the property in question as exempt on the ground that it constituted a part of his stock in trade, the whole of which was less in value than \$400.

Respondent was not estopped from asserting his exemption claim by reason of any fact stated in the findings. The conduct and statements of a party never operate as an estoppel in favor of another party where the latter is not influenced thereby in his subsequent action, and to his prejudice. The fact that respondent disclaimed any ownership of the property in himself, at the time of the levy, had no influence whatever upon the officer who made it, for he made it notwithstanding the disclaimer, and afterwards sold the property. The failure of respondent to interpose his claim of exemption as to such property at the time of the levy

could not work any estoppel against his making the claim subsequently, for it is neither found nor shown that the officer did, or omitted to do, anything by reason of such act of omission of the respondent, or that the plaintiff in the execution was in any way prejudiced thereby. The return of the property by the coroner, after the dismissal of the action in replevin for want of jurisdiction, was not, even if it were shown to have been done under the direction of the respondent, an act at all inconsistent with the claim of ownership and exemption made by him, and hence it can furnish no ground upon which to build an estoppel.

Order affirmed.

WILLIAM J. HUGHES *vs.* WINONA & ST. PETER RAILROAD
COMPANY.

September 8, 1880.

97	137
42	83
43	89
27	137
47	384
47	487

Master and Servant—Risks assumed by Servant.—Certain instructions of the trial court considered, and their effect, as applicable to the facts of this case, *held* to be that if an employer's unsafe and careless custom of doing business is open to observation, so that it can be readily observed by the senses, and the employe has ample and reasonable means of using his senses for the purpose of observing the custom, it is his own fault and negligence if he does not observe it, and he stands upon the same footing as if he has actual knowledge of the custom referred to, so that the risk to him from such custom is his own, and not that of the employer. This is about the same thing as saying that an employe must make reasonable use of his senses, to avoid danger and injury in the course of his employment, or, in other words, that he must not be negligent, and is a correct rule of law.

Same—Injury to Brakeman while Coupling Cars.—In this action the plaintiff was in the employ of the defendant as a night brakeman in defendant's yard at Winona, one of his duties being to couple cars. In the discharge of such duty he slipped and fell upon a pile of wet ashes, which, according to defendant's custom, had been taken out of the fire-box of a locomotive, and dropped upon the track. Plaintiff claimed that defendant was negligent, both in depositing the ashes upon the track, and in not

removing the same. No complaint is made that the track itself was not in good order and condition. The court instructed the jury that this mode of disposing of ashes was so common and long continued that it was practically the act of the company,—the defendant,—and that the company could not be heard to claim that it was only the negligence of plaintiff's co-servants. *Held*, that, in view of these instructions, the case of *Drymala v. Thompson*, 26 Minn. 40, has no application to the case at bar.

Appeal by plaintiff from a judgment of the district court for Winona county, where the action was tried before *Mitchell, J.*, and a jury.

Lloyd Barber, for appellant, cited *Drymala v. Thompson*, 26 Minn. 40; *Wedgwood v. Chicago & N. W. Ry. Co.*, 44 Wis. 44; *Bessex v. Chicago & N. W. Ry. Co.*, 45 Wis. 477; *Ryan v. Fowler*, 24 N. Y. 410; *Le Clair v. First Div., etc., R. Co.*, 20 Minn. 9; *Laning v. New York Central R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Kroy v. Railroad Co.*, 32 Iowa, 357; *Muldourney v. Illinois Central Ry. Co.*, 36 Iowa, 462; *Way v. Illinois Central Ry. Co.*, 40 Iowa, 341; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Porter v. Hannibal & St. Joseph R. Co.*, 60 Mo. 160; *Illinois Central R. Co. v. Welch*, 52 Ill. 183; *Quaid v. Cornwall*, 13 Bush, 64; *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549; *Plank v. New York Central R. Co.*, 60 N. Y. 607; *Harper v. Railroad Co.*, 47 Mo. 567; *Lewis v. Railroad Co.*, 59 Mo. 495; *Greenleaf v. Railroad Co.*, 29 Iowa, 14; *Railroad Co. v. Sweet*, 45 Ill. 197; *Railroad Co. v. Conroy*, 68 Ill. 560; *Brabbits v. Chicago & N. W. Ry. Co.*, 38 Wis. 289.

Wilson & Gale, for respondent.

BERRY, J. The plaintiff was employed as a night brakeman in the defendant's yard, where trains were made up, at Winona. Among other things it was his duty to assist in making up trains, and to couple cars. For the latter purpose it was necessary for him to go between cars in motion. It was defendant's custom, when necessary, to have the fire-

boxes of its engines cleared of ashes, at any place upon the track in the yard where an engine chanced to stand, when the engineer or fireman thought best to take them out. The ashes were usually allowed to remain where they were dropped upon the track from one to four hours, until removed or scattered by men employed by defendant to keep the yard in order. In attempting to couple two cars, one of which was in motion, for which purpose it was necessary for him to go between them, the plaintiff stepped upon a heap of ashes, which had been left upon the track in the manner above mentioned, and, the ashes being wet, he slipped and fell, and the moving car passed over his leg, crushing it so that it had to be amputated. He brings this action for damages, claiming that the defendant was careless and negligent in depositing the ashes upon the track, and in suffering them to remain there.

Among other matters, the court instructed the jury as follows, viz.: "Another rule of law is that if a man engage in a service, and continues in a service, with a full knowledge of the manner in which his employer conducts his business, and without objection, he is deemed, in law, to have assumed and taken upon himself all the risks naturally incident to conducting business in that way, even although it be unsafe. A man is, of course, under no obligation to investigate and examine how his employer conducts his business, for the purpose of ascertaining whether safe or not. In the absence of knowledge to the contrary, a servant has a right to presume that his employer will conduct his business safely. But if a man enters and continues in a service, with knowledge of the manner in which the business is conducted, without objection to his employer, or any promise on the part of his employer to change the mode of doing business, he does it with his eyes open, assumes the risks, and cannot recover damages, even although this mode of conducting business be careless. The same is true if the mode of conducting the business is open

and apparent, and the employe has ample and reasonable means of positive knowledge of the precise danger assumed. Hence, in this case, a material question is whether plaintiff either had positive knowledge of the custom of the railroad company in disposing of the ashes; or if it was open and notorious, and he had ample and reasonable means of positive knowledge of the fact, he would be deemed in law to have voluntarily assumed all the risks incident to the mode of conducting the business, and cannot recover even although the custom was unsafe." In another part of the charge, the court, referring to the defendant's custom of emptying ashes upon the track, instructed the jury as follows, viz.: "Did plaintiff have knowledge of this custom, or had he ample and reasonable means of positive knowledge of the custom, so that he ought to have known it? If he had, you must find a verdict for the defendant."

The plaintiff's counsel objects to those parts of the passages above quoted from the charge which instruct the jury as to the effect of the fact that an employer's mode of conducting business, though careless and unsafe, is open, and the employe has ample and reasonable means of positive knowledge of such mode. Some parts of the passages referred to, and bearing on the matter objected to, if they are detached from their context and from other parts of the charge, would be open to some criticism for looseness and inaccuracy. But if these passages are read together and as a whole, we think that they state a correct rule of law in respect to the subject of the counsel's objection. Their effect, as applicable to the facts of this case, is that if an employer's unsafe and careless custom of conducting business is open to observation, so that it can be readily observed by the senses, and the employe has ample and reasonable means of using his senses for the purpose of observing the custom, it is his own fault and negligence if he does not observe it, and he stands upon the same footing as if he had actual knowledge

of the custom referred to, so that the risk to him from such custom is his own, and not that of the employer. This is about the same thing as saying that an employe must make reasonable use of his senses to avoid danger and injury in the course of his employment, or, in other words, that he must not be negligent.

The instruction given by the court, with reference to a finding by the jury that the pile of ashes was exceptional, and of unusual size, or was left on the track an exceptional and unusual length of time, is, so far as the bill of exceptions discloses, purely abstract, since it does not appear that there was any evidence of a state of facts which would make it applicable to the case.

The other points made by the plaintiff's counsel, with reference to his exception to certain instructions given at defendant's request, and certain refusals to instruct at plaintiff's request, rest, as it seems to us, upon a misapprehension of the case of *Drymala v. Thompson*, 26 Minn. 40. That was a case in which a rail had been removed from the track by employes of the company, whose business it was to keep the track in repair. The track was held to be one of the instrumentalities for the working of the road, which the company was bound to use due diligence to furnish and to maintain in a condition which would render the working of the road safe for its employes. The responsibility of the company for so furnishing and maintaining the track was placed upon the same ground as its responsibility for furnishing and maintaining its locomotives or other machinery in suitable condition. The negligence of the company's trackmen in removing the rail, without putting out proper signals to warn approaching trains, was held to be the negligence of the defendants (the trustees in possession of the road) themselves, and for this and its consequences they were held liable. But in the case at bar, the court expressly instructed the jury that the custom of depositing and leaving the ashes upon the

track was "so common and long continued," that it was "practically the act of the company" itself, and the company could not be heard to claim that it was only the negligence of plaintiff's co-servants. As, in the absence of a positive showing to the contrary, the jury must be presumed to have followed the instruction of the court, it is apparent that this case did not present the question decided in the *Drymala Case*, viz., whether the alleged negligence which produced the plaintiff's injury was the negligence of the plaintiff's co-servants, or of their principals, the trustees before mentioned.

The *Drymala Case*, then, has no application to this case. If it appeared from the bill of exceptions (as it does not) that there was evidence that the heap of ashes was (as the court below says) of exceptional and unusual size, or was left on the track an exceptional or unusual length of time, it might then be necessary to consider the applicability here of the doctrine of the *Drymala Case*. Under the instruction of the court, the jury, in rendering a verdict for the defendant, must be taken to have found that the defendant was not guilty of negligence in depositing the ashes upon the track, and suffering them to remain there, or that, if in so doing it was guilty of negligence, then that the plaintiff was, or ought to have been, cognizant of defendant's custom to so deposit ashes upon the track and to suffer them to remain there for a time, and therefore took the risk of such negligence upon himself, by continuing in defendant's employ.

Order affirmed.

EDWIN S. CHITTENDEN, Receiver, *vs.* GERMAN-AMERICAN BANK,
impleaded, etc.

September 8, 1880.

Trial by Court—Motion for New Trial—Appeal.—When an action is tried by a district court, without the intervention of a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an appeal lies to this court.

Mortgage by one Partner of Partnership Real Estate standing in his Name, to raise Money for Firm Debts.—M. & B. were partners, engaged in manufacturing barrelstock. M. was owner of a certain tract of land, known as block 48. The firm erected a mill upon the block, and purchased and placed thereon an engine and other machinery, and also built other buildings thereon, all in connection with, and as necessary to, the prosecution of the firm's business, and went into and continued in occupation of the premises, for the purpose of carrying on their business. These improvements were made with firm money, and with the consent of both partners; but there does not appear to have been any express agreement with reference to the ownership, or removal, or other disposition of the same. Neither does it appear that there was any intention that they should be removed from the block. The buildings were permanent structures, the mill and machinery attached to the soil, and the other improvements appurtenant to the mill. In this state of facts, M. borrowed \$6,000 of G., giving his promissory note therefor, and, as security, executed and delivered to G. a mortgage of block 48 and other property. The money was borrowed and used by M., for the purpose of paying debts of the firm. *Held*, that M., possessing as a partner power to borrow money for firm purposes, and to give security for the same upon firm property, the firm, by permitting the title to block 48 to stand in M.'s name, may properly be said to have clothed him with authority to mortgage it in his own name for firm purposes, and that the mortgage to G. is therefore valid, binding the mortgaged property, and also the firm, whatever its rights in the property and improvements were.

Appeal by plaintiff from an order of the district court for Ramsey county, refusing a new trial, after a trial before Brill, J., without a jury.

Geo. L. Otis and E. S. Chittenden, for appellant.

John B. & W. H. Sanborn, for respondent.

BERRY, J. When an action is tried by a district court, without the intervention of a jury, it is not indispensable to

move for a new trial in order to a full review of the action of the trial court. *St. Paul Fire & Marine Ins. Co. v. Allis*, 24 Minn. 75. But, nevertheless, the statute and the practice allow a party to make such motion if he desires, (in order, probably, to give him an opportunity to obtain the relief to which he thinks he is entitled, without the labor and expense of an appeal,) and, from the order made upon the motion, an appeal lies to this court. Gen. St. 1878, c. 66, § 253; c. 86, § 8. The respondent's motion to dismiss must, therefore, be denied.

The court by which this action was tried finds the following facts: On March 30, 1875, and for a long time before, and until May 14, 1875, Adolph Munch and Randall K. Burrows were copartners under the firm name of Munch & Burrows, engaged in the manufacture of barrel stock, at Pine City, in this state. On May 14, 1875, in an action then pending between Burrows, as plaintiff, and Munch, as defendant, the object of which was to dissolve and wind up the partnership, Chittenden, the plaintiff in this action, was appointed receiver of all the assets of the firm, and, as such receiver, brings this action.

During all the time mentioned herein, Munch was and now is owner in fee of a parcel of land designated as block 48, in Pine City, the title to the same standing of record in his name. At some time before the year 1875, the firm, for the purpose of carrying on their business, built upon this block a stave-mill, and purchased and placed therein, and attached thereto, an engine and boilers, and other necessary machinery, and also built certain other buildings "appurtenant to said mill," and necessary for the same purpose, and, among others, a dwelling-house used for a boarding house, and a dwelling-house occupied by Burrows in connection with the business; and thereafter, until the plaintiff's appointment as receiver, the firm was in the occupation of the premises, carrying on business therein. Upon plaintiff's appointment, he took possession of the premises, and has since remained in possession.

The improvements mentioned were made upon the block with firm money, and with the consent of both partners, but it does not appear that there was any express agreement respecting the ownership, or removal, or other disposition of the same; neither does it appear that there was any intention that they should be removed from the block. The buildings were permanent structures, the mill and machinery attached to the soil, "and the other improvements were appurtenant to the mill."

On March 30, 1875, Munch borrowed of Gotzian \$6,000, giving his promissory note therefor, and, as security, executed and delivered to Gotzian a mortgage upon block 48 and other property, which was duly recorded. The mortgage was assigned to Mrs. Weide, and by her to the German-American Bank, in both cases for value, and both assignments were duly recorded. The bank is now the owner and holder of the note and mortgage, no part of the same having been paid, except the interest to August 6, 1879. Munch borrowed the money of Gotzian, and used it, for the purpose of paying debts of the firm. When Gotzian lent the money, and took the note and mortgage, he knew that the firm of Munch & Burrows was carrying on its business on block 48, but had no notice otherwise that the firm had any claim to said block, or to the improvements thereon, Munch representing to him that he (Munch) was the owner of both, and Gotzian, upon an examination of the record, made the loan and took the mortgage, believing Munch to be the owner of the property, and relying on the mortgage as security. At the time when the mortgage was given, the lands embraced therein, exclusive of improvements, were worth \$600, and the improvements \$12,000. Their relative value remains the same, but the actual value at the present time is much less. Munch is insolvent.

The important question in the case is whether "the improvements" passed by the mortgage to Gotzian. The district court was of opinion that they did pass, and we are of

the same opinion. According to the finding, which is supported by the testimony, "the improvements" were so made as to form part of the realty, as respects the matter of physical annexation. The title to block 48 was in Munch, a fact known to the firm. Munch, as a member of the firm, had the usual authority to borrow money upon a firm note, and to give security upon partnership property. These considerations are decisive. It may be admitted, for the purposes of this case, that at the time when he lent the money, Gotzian knew, either actually or constructively, that "the improvements" were put upon the block by the firm, with firm money, and for firm purposes exclusively. Notwithstanding this, the facts remained that the title to the improvements, as a part of the realty, stood in Munch's name, that the firm knew this, and that Munch, as a partner, had authority to give security upon partnership property for money borrowed by him for partnership use. As a matter of course, authority to give the security mentioned was authority to give it in a practicable way, and according to the applicable rules of law. The title to the property standing in Munch's name, this was, therefore, an authority for him to mortgage it in his name. In other words, the firm, by permitting the title to stand in his name, may properly be said to have clothed him with authority to mortgage it in his name for firm purposes. It follows that the mortgage made to Gotzian was a valid mortgage, and bound the mortgaged property and the firm, whatever its rights in the property or improvements were. If the mortgage was good as against the firm, it is, of course, good against the firm's receiver.

Order affirmed.

HARVEY OFFICER, Executor and Trustee, vs. MARY L. SIMPSON and others.

September 13, 1880.

Trust to Receive and Apply Rents and Profits.—The decision in *Simpson v. Cook*, 24 Minn. 180, construing the will of James W. Simpson as to the power of the trustee named in it to sell real estate, adhered to.

James W. Simpson, of the city of St. Paul, died on May 31, 1870, seized of certain real estate in block 16, and certain other real estate on the levee, in that city. By his last will he named the plaintiff as his executor, and made the following dispositions affecting his real property:

"*Fourth.* I desire that my wife and children shall continue to occupy the house we now reside in, together with so much of block 16 in St. Paul proper as is enclosed in the fence now surrounding said house, until a permanent homestead shall be purchased for them as hereinafter provided.

"*Fifth.* Whenever my said executor shall deem it best for the interests of my estate, he may sell the whole or any part of the real estate belonging to me in block 16, St. Paul proper, and out of and with the proceeds thereof (or with other funds belonging to my estate, if he shall deem it best so to do) he shall purchase a house and lot or lots in said city of St. Paul, for which he shall pay a sum not exceeding \$4,000, which property shall be purchased in the name of my estate, and which shall thereafter become the homestead of my said wife and our children; and when our youngest child shall become of lawful age, my said executor shall convey the said homestead and property so purchased to my said wife, in fee simple, if she be then living; and if not then living, the said property shall be divided amongst my children in the manner hereinafter provided.

"*Sixth.* My said executor shall, during the lifetime of my said wife, pay over to her monthly or quarterly such sums of money

as may be necessary in his judgment for the prudent and economical support and maintenance of my said wife, and for the support, maintenance and education of such of our children as may live with my said wife in her homestead, during their minority, or until the marriage of our daughters; and he shall also pay for the education and maintenance of such of our children as may be absent from home attending school with the consent and approbation of my wife and my said executor: it being my express desire that all my children may have such education as my estate will justify.

"Seventh. It is my desire that no division of the balance of my real estate shall be made amongst my children until the youngest child shall become of lawful age. But if the net income and profits of my estate shall justify it, my said executor may at any time in his discretion advance to any one or more of my children who are of lawful age, or lawfully married, such sums as he may think can be spared from the said net incomes and profits, or from the proceeds of the real estate authorized to be sold as aforesaid, without prejudice to the said estate, and without prejudice to the maintenance of my said wife and minor children.

"Eighth. When my youngest child shall become of lawful age, all the rest and residue of my real estate and personal property, wheresoever situate, shall be equally divided between my said wife and our children, share and share alike, the shares of each child being subject to any advancements made to them by my executor, as aforesaid."

In 1871 the plaintiff sold a part of the land in block 16 to J. B. Cook, and used the greater part of the proceeds in improving the levee property, which consisted of two warehouses, one of which was of wood, in a ruinous condition, and the other of stone. The former he rebuilt, and upon the latter put a new roof. At the time of the testator's death the property on the levee yielded a rental of \$2,000 per year. In consequence of changes in the levee itself, and of the withdrawal of mercantile business therefrom, and from other causes, the

value of property there had steadily declined, until, in 1875, when this action was brought, the two warehouses yielded a rent of not more than \$1,200 per year, while, on the other hand, the value of the land in block 16 was rapidly advancing, in consequence of street improvements in the vicinity, and the erection of buildings for wholesale trade. The gross income of the estate being reduced to \$2,050, and this being further reduced, by payment of taxes, to \$1,133, and several of the children being still minors, the plaintiff brought this action in the district court for Ramsey county, praying that his sale to Cook of land in block 16 might be confirmed, and asking authority to sell and convey the levee property for the sum of \$30,000, which had been offered him therefor by the Milwaukee & St. Paul Railway Company,—that corporation owning the property on both sides of the warehouses, and wishing to buy them to use with such other property.

The action was defended by the widow of the testator, and by consent of parties was tried by a referee, who found, among others, the foregoing facts, and also that the net income of the estate was insufficient for the maintenance of the widow and the support and education of the children; that the value of the levee property had been steadily declining for several years; that it was not worth in market more than \$15,000 and was likely to continue to decline in value in the future; that the estate could be made sufficiently productive to enable the plaintiff to carry out the wishes of the testator in respect to the maintenance of the widow and the support and education of the children, only by a sale of a part of the testator's real estate and the reinvestment of the proceeds in productive property, and that it was for the interest of the beneficiaries under the will that the levee property should be sold to the railway company at the price offered, and that the sum so realized be reinvested in productive property, rather than that any sale or other disposition be made at present of the property remaining unsold in block 16.

As conclusions of law the referee held that the sale to

Cook should be confirmed, and that the court had no power to direct or authorize a sale of the levee property. Judgment was entered accordingly, and the plaintiff appealed. Pending this appeal, the widow brought an action to set aside the sale to Cook. See *Simpson v. Cook*, 24 Minn. 180.

Harvey Officer and Bigelow, Flandrau & Clark, for appellant.

The entire estate in the lands is vested in the trustee, subject only to the execution of the trust, the beneficiaries having no estate or interest therein. Gen. St. 1878, c. 43, § 16. If a sale is to be made, it can only be made by the trustee. *Perry on Trusts*, §§ 312, 313; *Cruger v. Jones*, 18 Barb. 467. The paramount object of the trust is the maintenance of the widow and the support and education of the children during their minority; (see the 6th clause of the will;) and to that object, defined with clearness and certainty, money is devoted to the extent of its necessities, of which the executor is made the sole judge, and which he is not merely desired or requested, but commanded, to meet. This object should be carried out. If it cannot be done without a sale of the property, the property should be sold. The executor is not in terms directed to raise the moneys out of the rents and profits; but if he were, the failure of rents and profits should not be allowed to defeat the trust, for the presumption is that the testator intended that the moneys should be raised at all events, so that the end and object of the trust may be accomplished. The rents and profits, in such a case, are but the means to an end, and the means shall not control the end, but yield to it. 2 Story Eq. Jur. §§ 1064, 1064a; *Purdie v. Whitney*, 20 Pick. 25.

There is nothing in the will which in terms forbids a sale, or requires the executor to hold any specific property during the trust term. The first sentence of the 7th clause expresses a desire that no division of the real estate be made, not that no sale shall be made; and if this can be construed as an expression of the testator's desire that certain real estate shall not be sold, it is only a desire, not a positive direction, and

the whole matter is left to the discretion of the executor. 2 Redf. Wills, (2d Ed.) 415, 416, 423; *Heneage v. Andover*, 4 Exch. 369, 390-1; *Matter of Pennock's Estate*, 20 Pa. St. 268, 280; *Gilbert v. Chapin*, 19 Conn. 342, 351; *Harper v. Phelps*, 21 Conn. 257; *Sharon v. Simons*, 30 Vt. 458; *Van Amee v. Jackson*, 35 Vt. 173; 2 Story Eq. Jur. § 1069; *Perry on Trusts*, §§ 114, 115, 118, 448, 581; *Dimes v. Scott*, 4 Russ. 195; *Walker v. Whiting*, 23 Pick. 313; *Baker v. Rea*, 4 Dana, 158.

No appearance for respondent.

GILFILLAN, C. J. The will involved in this case was before us for construction in *Simpson v. Cook*, 24 Minn. 180. The only respect in which a construction of it is sought now, is in regard to the power of the trustee appointed by the will to sell the real estate other than that in block 16. The same question was presented in *Simpson v. Cook*, and we held there was no power given the trustee to sell such other real estate. Upon again examining the provisions of the will, we are satisfied that decision was correct. Not only is there no language in the will expressing an intention that the trustee should have authority in any event to sell the other real estate, but such intention is excluded by the power being confined to the real estate in block 16. The will reads in the fifth clause: "Whenever my said executor shall deem it best for the interests of my estate, he may sell the whole, or any part, of the real estate belonging to me in block 16." The only mention in the will of the other real estate is in the seventh clause: "It is my desire that no division of the balance of my real estate shall be made amongst my children until the youngest child shall become of lawful age;" and in the eighth clause: "When my youngest child shall become of lawful age, all the rest and residue of my real estate and personal property, wheresoever situate, shall be equally divided between my said wife and our children, share and share alike." These clauses show it was the intention of the tes-

tator that his real estate, other than that in block 16, should remain intact until the time indicated for its division.

The will provides, in the sixth clause, that the executor shall pay, monthly or quarterly, to the wife, such sums of money as, in his judgment, may be necessary for her prudent and economical support and maintenance, and that of such of the children as may live with her, during their minority, or until the marriage of the daughters; and shall pay for the education and maintenance of such of the children as may be absent at school with the consent of the wife and the executor. It is argued that this is the paramount object of the trust, and that if this object cannot be carried out except by a sale of the real estate, as the keeping intact the real estate other than that in block 16 is a subordinate object, it must yield, and in that event the power to sell exists. The report of the referee, while it shows that it would be better for all concerned to have such other real estate sold, does not show it necessary for the support and maintenance of the widow and children. But if it did, it would not affect the question. The power to sell the real estate could exist only where such was the intention of the testator. If he did not intend it to be sold for the support of the widow and children, then the trustee has no power to sell it for that purpose. The will indicates the fund or portion of the estate from which he intended the widow and children to be supported. Besides the real estate, the testator left a considerable amount of personal property. The real estate authorized to be sold was of great value, and that not authorized to be sold was bringing considerable rent. In the latter part of clause 7, the will authorizes the trustee, at any time, at his discretion, to make advances to any one or more of the children of lawful age, or lawfully married, of such sums as he may think can be spared from the net incomes and profits of the estate, or from the proceeds of the real estate authorized to be sold, without prejudice to the estate, and without prejudice to the maintenance

of the widow and minor children. It was clearly not the testator's intention that the real estate which the trustee was not expressly authorized to sell should be, in any event, diverted from his purpose to have it remain a part of the estate till divided as the will directs.

Judgment affirmed.

STATE OF MINNESOTA vs. J. N. HYDE.

September 13, 1880.

Intoxicating Liquor—Sale to Minors, etc.—Gen. St. 1878, c. 16, § 10, describes two distinct and separate offences, and prescribes a punishment for each. An indictment under the first and second sentences of the section need not allege any notice forbidding a sale, such as is mentioned in the subsequent provisions of the section.

Objection to Evidence—"Same as Above."—An objection in either of these forms—"objected to the same as above," or "as above"—only indicates such grounds of objection as are stated in the last preceding objection made, and the trial court may properly treat it as such.

Same—No Ground stated.—An objection which discloses no ground therefor presents no question for a ruling, and a decision overruling the same is not error.

Evidence *held* sufficient to sustain the verdict.

The defendant was tried, and convicted in the district court for Martin county, *Dickinson*, J., presiding, on an indictment charging that "the said J. N. Hyde, on the 16th day of December A. D. 1878, at the village of Fairmont, Martin county, Minnesota, did sell and dispose of unto Jay B. Colton, then and there a minor person, intoxicating liquors in a certain quantity, the exact quantity being to this grand jury unknown, contrary to the statute," etc. A motion for a new trial was denied, and judgment was rendered, and the defendant appealed.

Benj. G. Reynolds and *J. L. Higgins*, for appellant.

Geo. P. Wilson, Attorney General, for the State.

CORNELL, J. Section 10, of chapter 16, of the General Statutes of 1878, provides for two distinct offences, and prescribes a separate and different penalty for each. The first two sentences of the section relate to one of these offences, and the rest of the section exclusively to the other. As is not unfrequently the case with our statutes, the second sentence contains an inaccuracy of expression, which is clearly the result of an inadvertence, for the context makes it sufficiently manifest that reference was had solely to the preceding portions of the section, in the clause therein declaring that "any person violating any of the provisions of this section shall be guilty of a misdemeanor," etc. The offence charged in the indictment in this instance is one described in the first sentence of the section, which provides that "it shall be unlawful for any person to sell, give, barter, furnish, or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt or fermented liquors, in any quantity whatever, to any minor person, or to any student," etc. To make out this offence, no written notice was required to be shown, such as is mentioned in the concluding sentence of this section. The point, "that the indictment fails to allege, and the evidence to show, that the defendant was forbidden to sell to Colton, the minor, or that he was a student," was not well taken, as neither fact was essential or material.

At the trial, after proving the fact that the defendant was engaged in the business of keeping a saloon, and selling spirituous, vinous and malt liquors, at Fairmont, under a license, from July 17, 1878, to January 17, 1879, the prosecution called as a witness one Austin Belden, who testified that he was in defendant's saloon several times during December, 1878, but was unable to state who was usually behind the bar, and that he was also in there once about the 16th of that month, with J. B. Colton. Thereupon several questions were put to said witness, tending to prove, and the answers to which tended to prove, that the witness Colton, and another

by the name of Belden, were in the saloon on that day, and then and there treated each other to liquor and beer, and paid therefor the person who was tending the bar at the time, who, as witness thought, was one Callahan; it being left in doubt, however, whether Hyde, the defendant, was present or not, although witness stated that he did not think Hyde was present in the saloon when Jay (meaning Colton) drank. These questions were severally objected to by the defendant, on the general grounds of immateriality and incompetency, no particular reasons therefor being specified, and the objections were overruled and exceptions taken. There can be no doubt that the evidence sought by these inquiries was both competent and material, in case the transaction was authorized by the defendant. As the want of such authority was not made a specific ground of objection at the time, it was within the discretion of the court to allow proof of it to be made at any time during the progress of the trial; and an omission by the court requiring it to be done in the first instance, especially as its attention was not called to the matter in regard to the order of proof, cannot be assigned as error. The rulings upon the objections made, therefore, furnish no ground for a new trial.

Next after these rulings were made, J. B. Colton was sworn, and, after testifying as to what the "J" in his name stood for, the defence interposed an "objection to the introduction of any further and all testimony under the indictment, on the ground that the name of said Colton was not properly laid or stated in the indictment." This was overruled, and an exception duly taken. The correctness of this ruling is not questioned on this appeal, as, in fact, it could not well be. After this ruling, numerous objections were made by defendant to the introduction of evidence, in this language: "Objected to, same as above;" "objected to, as above." The trial court was fully justified in treating all these objections as based solely upon the same grounds as the last preceding one made and ruled upon, which related to the alleged defect in the indict-

ment as to the name of Colton. Thus considered, the rulings thereon and the exceptions taken present no ground of error.

Aside from the objections already noticed, defendant made none during the trial to the introduction of any evidence offered and received, except in a few instances, in which no ground for the objections whatever was stated; and as these presented no point for a ruling, they were properly disregarded and overruled.

The only other question properly before us for consideration upon the record herein is as to the sufficiency of the evidence to support the verdict; and, as to this point, the court is satisfied that there was sufficient competent evidence in the case, tending to prove the allegations in the indictment, to sustain the verdict.

Judgment and order affirmed.

JOSEPH FERGUSON *vs.* JOSEPH KUMLER.

September 13, 1880.

Homestead—Excess over Statutory Limit.—The fact that the homestead which a party has actually made, and is occupying and claiming as such, includes more land than is permitted to be included within the limits of an exempt homestead, under the provisions of section 1 of the homestead statute, does not render the whole of such homestead tract liable to sale on execution, even though such party wholly neglect to define the boundaries of his homestead within the limits prescribed by that section. The ruling upon this point, in the decision of this case on a former appeal, (25 Minn. 183,) adhered to.

Same—Sale by Owner.—Since the enactment of the statute allowing the owner of a homestead to sell and convey the same, and providing that no judgment shall be a lien on such homestead for any purpose, (Gen. St. 1878, c. 68, § 8,) a sale of the homestead, even with a fraudulent intent, will not make the same liable to forced sale on execution. *Morrison v. Abbott*, *ante*, p. 116, followed.

This action was commenced before a justice of the peace, under Gen. St. c. 84, § 11, to dispossess defendant of certain

land, which had been sold on execution against him to plaintiff, and the time for redemption from the sale having expired. The title to real estate becoming involved, the action was certified to the district court for McLeod county. After the decision of the former appeal (reported, 25 Minn. 183,) the action was retried before *Macdonald, J.*, and a jury, which returned a special finding of the facts and a general verdict for defendant. The plaintiff moved for judgment on the special findings, and notwithstanding the general verdict. The motion was denied, judgment was entered for the defendant, and the plaintiff appealed.

Bigelow, Flandrau & Clark and S. L. Pierce, for appellant.
L. M. Brown, for respondent.

CORNELL, J. In the special findings returned by the jury, it is stated that, at the time of the levy, the defendant notified the sheriff that he claimed a homestead in the land whereon he resided with his family, but that he did not in any manner designate to the officer any particular part of the premises which he claimed as a homestead. There is no specific finding, however, in respect to the allegations of the answer, "that he, the said defendant, there and then notified the sheriff that he regarded and claimed 80 acres of said premises as his homestead, and did then and there demand of said officer that he be allowed to select such homestead therefrom, as provided by law, and that said 80 acres so selected be excepted from such levy, seizure and sale; and that said officer then and there refused to allow said defendant to select such homestead, and then and there notified him that he should and would sell the whole of said premises under said execution." In determining, therefore, plaintiff's motion for judgment, the truth of these allegations must be taken as established by the general verdict in favor of the defendant upon all the issues involved in the pleadings. Upon this state of facts, the question presented for adjudication is whether the sale which was made upon the execution, in pursuance of the levy, of the entire premises,—which the defendant, a married man, then

occupied as an owner, claiming a homestead right therein, and on which he resided with his family, in a dwelling-house situated thereon,—in total disregard of the existence of any homestead, was a valid sale, sufficient to transfer the title, and enable the plaintiff to recover the possession of said premises, or any part thereof, in this action?

In the consideration of this case on a former appeal, (25 Minn. 183,) it was held that it was not necessary for an execution debtor, in order to preserve his homestead exemption, to give to an officer about to make a levy a description of the premises claimed by him as a homestead, together with a notice that he was claiming them as such. In stating the reasons for this ruling, the court then said, (p. 188:) "The statute gives the exemption absolutely, and without making the right to it dependent upon any affirmative action upon the part of the person claiming it towards an officer levying, or about to levy, upon it. In the second place, the exemption is not provided for the sole benefit of the owner of the land, if he be a married man. In such case, the homestead law is a family measure, * * and it is not competent for the husband alone, in any way, to effectually waive the exemption."

If the positions thus taken are good, and the ruling then made is to stand, they are decisive of the question under consideration; and this the counsel for plaintiff seems to concede, for he asks us to review that decision as erroneous. His contention, in brief, is this: That the statute makes no provision for securing a homestead against forced sale on execution when the debtor is residing upon and occupying as a homestead a greater quantity of land than 80 acres, except upon the condition that he makes a selection, and defines by metes and bounds, within the prescribed limits, the particular tract which he regards as his homestead. Until this is done, he has no homestead exempt from seizure and sale on execution. In other words, this fact of a selection by the debtor, and setting apart by metes and bounds, of the specific

lands claimed as a homestead, is one of the tests and elements essential to the creation and existence of an exempt homestead under the statute.

This construction, in our opinion, is at variance with the manifest policy of the homestead law, and its leading purpose, as evidenced by the language of the statute. The law originated in the wise and humane policy of securing to the citizen, against all the misfortunes and uncertainties of life, the benefits of a home, not in the interest of himself, or, if a married man, of himself and family alone, but likewise in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred—sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed. Its leading purpose is to exempt from forced sale a homestead—the place made such by the choice, residence, use and occupancy of the owner as a home, including, as its necessary incidents, the dwelling-house and its appurtenances, and the land thereto belonging. But these are not, like the homestead itself, the primary objects of the exemption. They are only covered by it because, being constituent parts of the homestead, they are necessarily included within it as such parts. *Tillotson v. Millard*, 7 Minn. 419 (513;) *Gregg v. Bostwick*, 33 Cal. 220, 225. Such being the purpose and policy of the statute, its provisions should be liberally construed, so as to carry out the legislative intent thereby manifested.

The word "homestead" is used in this statute in its ordinary and popular sense, to designate a dwelling-place used and occupied as a home for its owner, and his family, if he has one. *Tillotson v. Millard*, 7 Minn. 419 (513.) It comprises fitness in the place for the uses of a home, which includes a dwelling-house and more or less land connected therewith, and residence, use and occupancy by the owner as a home for himself, and also for his family, if he have one. These

are the essential tests of a homestead in fact, and, wherever these facts exist, there is a homestead which has already been selected or chosen, and which the statute was intended to protect absolutely in favor of the owner and his family, subject simply to a limitation upon the quantity of land allowed to be retained as a part of it, in case the place so used and occupied exceeds the limits prescribed by the statute. The question as to quantity is unimportant in determining the existence of the homestead, and the right of the owner to the benefits of the exemption: it is only pertinent after a homestead is once established, and then only as a question of limitation upon the extent of the homestead, with reference to ascertaining what excess, if any, outside the prescribed limits, is liable to sale on execution. *Gregg v. Bostwick*, 33 Cal., *supra*.

The settlement of this question by the debtor householder is not made by the statute a condition, either to the creation of an exempt homestead, or to his continued enjoyment of one already created. On the contrary, it distinctly recognizes the fact that an exempt homestead may exist under the protection of the statute, when the householder is using and occupying for a home land in excess of the statutory limits, and when he has not defined the boundaries of his homestead within the prescribed limits, by setting apart the same "by metes and bounds," (Gen. St. 1878, c. 68, § 3;) and, in such case, the privilege is accorded him of fixing such boundaries after a levy; but a failure to exercise this privilege is not made a cause affecting his right of exemption, either as a waiver or as a forfeiture. Upon this point the statute is silent. The legislature seem to have acted upon the presumption that a privilege thus advantageous to the debtor would always be exercised, and hence have only provided a check against its abuse, by giving to the plaintiff in the execution, in case of dissatisfaction caused by the debtor claiming and setting apart, as a part of his homestead, more land than he is entitled to hold under the limitations prescribed, a right to cause a resurvey thereof by the officer, at the debt-

or's expense. *Id.* § 4. The same consequence, as was intimated in the opinion on the former appeal herein, would probably flow from an entire omission of the debtor to specify any limits or boundaries to his homestead, but no greater; for it is not to be supposed that it was within the intention of the legislature to visit upon the debtor and his family any more serious consequences, for an omission to exercise a privilege, than for its abuse. If the construction contended for by plaintiff is to prevail, the benefits intended to be secured to the family of the debtor, beyond any act of waiver or disposition on his part alone, might be effectually lost through his mere carelessness, or, perhaps, connivance with the creditor. We see no good reason for changing the ruling or modifying the views expressed upon the former determination of this case.

Whether, upon the general verdict and the special findings, the conveyance from Michael Kumler to the wife of the defendant is to be treated either as an absolute transfer to her, with a fraudulent intent, of the whole title to the property, both legal and equitable, or as merely vesting in her the naked legal title, which Michael held solely in trust for his son, after the payment of the debt on account of which he acquired such title as a security, is wholly unimportant, for in neither case was the homestead interest (which defendant, as the equitable owner thereof, had in the premises at the time the judgment was docketed, in May, 1862) subject to sale on the execution issued in 1870. In the latter case, he still remained the equitable owner of the homestead, and was entitled to the protection of the statute, by which it was exempt. *Wilder v. Haughey*, 21 Minn. 101. If the former was the case, and the absolute title to the property was transferred to the wife through the procurement of her husband, he had the right to cause such transfer, so far as it related to the homestead, to be made, as against this judgment, even though it was made for a fraudulent purpose; for, by the statute, (Gen. St. 1878, c. 68, § 8,) the judgment was no lien

upon the homestead for any purpose, and any sale or conveyance of it by him would not render it liable to a forced sale on execution. *Morrison v. Abbott*, ante, p. 116.

In respect to the position that the sale on the execution was valid as to the excess over the 80 acres which the defendant was entitled to hold as his homestead, and that, therefore, plaintiff was entitled to a judgment for the recovery of the possession of such excess, it is sufficient to say that neither the pleadings, the general verdict, nor the special findings, furnished any data for ascertaining the boundaries of such excess.

Judgment affirmed.

27	142
41	216
27	162
50	25
50	164
27	162
160	440
27	162
66	22
27	162
80	30

ISAAC BROWN vs. WINONA & ST. PETER RAILROAD COMPANY.

September 13, 1880.

Master and Servant—Negligence of Fellow-Servant.—A master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment. That the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule.

Appeal by defendant from an order of the district court for Brown county, *Cox*, J., presiding, refusing a new trial.

Wilson & Gale, for appellant.

S. L. Pierce, *J. M. Thompson* and *B. F. Webber*, for respondent.

GILFILLAN, C. J. Plaintiff was employed as a section man on the railroad of defendant. One Jacks was employed by it as "road-master." They, with others, were engaged in raising several wrecked freight cars, when plaintiff received a serious injury, by reason, as the complaint alleges, of the negligence, carelessness and unskillfulness of Jacks. There is no allegation of negligence on the part of defendant in

employing Jacks, nor of the use of improper, defective or insufficient machinery to raise the wreck; and it appears from the evidence, beyond any question, that Jacks was a competent and proper person for the work in which he was engaged, and that the machinery was proper and sufficient; so that plaintiff's claim to recover rests on the alleged negligence and carelessness of Jacks in the manner of doing or ordering the work.

As appears from the evidence, the ordinary duties of section men are, under their foreman, to keep the track within their section in order, and, when called on by the road-master, to assist in raising and removing wrecked cars, even though within another section. The business of the "road-master" is to keep the track in order along the entire line, as we infer from the evidence, including the raising and removing of wrecked cars. For the purpose of performing his duties, he has authority over the section men. As to what he shall do, and when he shall do it, he is under the orders and control of the superintendent. He is the overseer of those he calls to assist him. In the manner of working, unless otherwise directed by the superintendent, he is left to his own judgment and discretion. But he has nothing to do with employing or discharging men, or providing machinery or tools to work with. Above him, in respect to authority, are, first, the superintendent; next, the manager, and the president and directors of the company.

That as a general rule the master is not liable to one servant for an injury caused by the negligence of another servant in the same common employment, is held by every court which decides according to the principles of the common law. This court so held in *Foster v. Minn. Central Ry. Co.*, 14 Minn. 360. The rule has strong considerations of public policy, as well as private justice, to sustain it. In the case of a stranger, the rule *respondeat superior* applies in all its force. In such case, the act of the servant within the scope of his employment, however inferior may be his grade or authority, is the

act of the master, and his negligence is the negligence of the master, for the consequences of which the latter is responsible, as he is for his personal act and negligence. The rights of the stranger against the master are not modified by any contract relation. The duties and rights of master and servant, with respect to each other, are controlled by the contract of employment, which impliedly imposes duties and risks upon each. No case, not governed by statute, holds the master liable at all events to a servant injured by the negligence of another servant in the same employment. No case intimates that the master is an insurer of the servant against possible injury.

The duties which the contract of employment imposes on the master are that, where machinery or instrumentalities are to be used in the work, he will exercise due care and caution in providing such as are fit and safe; and, where co-servants are to be employed, he will use due care and caution in selecting such as are competent and careful. For injuries arising from failure to perform these duties the master is liable, and he cannot avoid the liability by deputing another to perform them in his stead. There are cases which appear to add to these duties the duty not to have the servant set, either by the master or by one whom he places in authority over him, to do work more dangerous than he engaged to do, or to do unusually hazardous work, where, from youthfulness or feebleness of intellect, the servant may be supposed to be unable to appreciate the danger and guard against it, or the hazards of which are known to the master, but are unknown to, and not open to the observation of, the servant. There is nothing in this case to make it necessary for us to decide on these propositions, or do more than allude to, without expressing any opinion on, them.

All the authorities, where there is no statute on the subject, agree that in the contract of employment the servant assumes such risks as—the master having performed the duties we have mentioned—are still necessarily incident to

the business or work which he engages to do, and which risks he may be taken to have in mind when he enters the employment. Where he is to work with or about machinery, as, notwithstanding any degree of care in providing it, there is still, ordinarily, the possibility of injury from its use, he must be supposed to take that risk on himself; and because, notwithstanding the utmost care and caution in selecting them, there is danger of injury from the negligence of fellow-servants, he is held to assume that risk. These are risks which are necessarily incident to the employment. As said by the court in *Brothers v. Cartter*, 52 Mo. 372, 375: "If a workman or servant is to work in conjunction with others, he must know that the carelessness of his fellow-servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant, on entering upon the employment, is supposed to know and assume this risk." The reason here given for holding the servant to assume the risk of injury from negligence of his fellow-servants—to wit, that he must know, when he enters upon the employment, that neither care nor diligence by the master can prevent it—we think indicates what servants are to be regarded as fellow-servants, the risk of whose negligence is assumed by a servant when entering upon the employment.

It is upon this point that the authorities disagree. Some courts, the supreme court of Ohio being the leading one, hold that where the injured servant is subordinate to him whose negligence causes the injury, they are not "fellow-servants," and the master is liable. On the other hand, the great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow-servants as regards the liability of the master for injuries to one caused by the negligence of the other. If the servant is supposed to assume the risks which the master,

with due care and diligence, cannot prevent, and we think it is so, then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself. For, in respect to such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence, any more than he can prevent the casual negligence of those inferior in grade. This conclusion is decisive of this case, for the road-master was no more than a superior servant or overseer, the risk of whose negligence was assumed by plaintiff when he entered upon the employment.

Order reversed, and new trial ordered.

DANIEL O'CONNOR and another *vs.* CHICAGO, MILWAUKEE &
ST. PAUL RAILWAY COMPANY.

September 13, 1880.

27	166
81	366
27	166
82	188

Animals Trespassing on Railway.—Rule as to liability for injury to animals trespassing on a railroad track, laid down in *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350, and *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, followed.

Erroneous Statement of Evidence by Court.—If the court, in stating what the evidence is claimed to be, so states it that the jury may be misled, the party excepting must specifically call its attention to it, so that it may be at once corrected.

Railway Accident—Declarations of Officials as Part of the *Res Gestæ*.—In case of an accident by a railroad train running upon and injuring horses on the track, what was said by the engineer to the conductor of the train immediately after the accident and after the train had stopped, and while they were examining to ascertain what mischief had been done, indicating when he first saw the horses on the track, there not appearing anything but the occurrence to cause or produce the statement, may be proved by the plaintiff as part of the *res gestæ*.

Evidence *held* sufficient to sustain the verdict.

Action to recover the value of certain horses of plaintiff, which were struck and killed by a freight train on a trestle-work on the river division of the plaintiff's railway, a few miles south of St. Paul. The train was going north. It was claimed by the plaintiff that the horses went upon the track at a point 1,920 feet south of the trestle, where there was a private crossing and gate. A culvert, which horses could not cross, was situated 870 feet south of the crossing, and 600 feet north of plaintiff's fence. The track was straight from the culvert north to the gate, and from the gate north to the crossing. The road-bed from the crossing to the trestle was of such a character that a horse could not leave it. There was evidence that the locomotive whistle was sounded at the fence, and that the whistling was kept up until the horses were struck, and that it was such as is used to drive cattle from the track. The time of the accident was shortly before 9 o'clock in the evening of September 16, 1878. The plaintiff claimed that the engineer must have seen the horses while the train was south of the culvert, and that he was guilty of negligence in not checking the train. At the trial in the district court for Ramsey county, before *Wilkin, J.*, the plaintiff testified that some time after the accident, and when the locomotive (which had been thrown from the track) had been replaced upon it, and the train was ready to start again, the conductor came to the caboose and said to the brakemen, "Now you get right up there, and go to where you can get hold of the brakes." The same witness also testified that when he first arrived at the scene of the accident, and while the defendant's men were at work about the train, and talking about the accident, the engineer of the train said to the conductor, "I thought I saw five horses coming in the gate out of the crossing." The testimony in each case was duly objected to, and exception taken. The jury found for the plaintiff, a new trial was refused, and the defendant appealed.

Bigelow, Flandrau & Clark, for appellant.

Davis, O'Brien & Wilson, for respondent.

GILFILLAN, C. J. Under the rule laid down by this court in *Locke v. First Div. St. Paul & Pac. R. Co.*, 15 Minn. 350, and approved and followed in *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410, as to the liability of railroad companies for injuries done to animals trespassing upon their tracks, there was sufficient evidence to sustain the verdict in this case. If the jury believed, as they seem to have done, the testimony of plaintiffs' witnesses as to the location of the train when those in charge appear to have discovered the horses on the track, as to the character of the track, and the difficulty for horses to get off it when frightened, as to the probable speed of the train when it struck them, and that of witnesses for defendant as to the distance within which that train could have been stopped, they might very well find that it was great negligence on the part of those in charge of the train that they did not sooner check its speed, so as to have it entirely under control before it reached the point where the accident happened.

The exception that the court did, on its charge, misstate the evidence of Niccault seems to have arisen from a misunderstanding of what the court said. In that part of its charge it was not stating what Niccault swore to, but only what plaintiff claimed his evidence to be. If the jury might be misled by this statement of the court, its attention should have been specifically called to it, so that it might be at once corrected.

We cannot see how the admission of what the conductor said to the brakemen could have had any influence with the jury. It is, therefore, immaterial whether it was admissible or not. What the engineer said to the conductor was calculated to affect the finding. Its admission raises the only serious question in the case—one of great difficulty. It appears to have been said immediately after the horses were struck and the train stopped, and while those in charge were

examining to ascertain what mischief had been done, and was in direct connection, in time, with what had just occurred, and related to what they were then at.

To make declarations of an agent evidence against his principal, they must not only have been made while he was engaged in the business of the principal, but they must be a part of the transaction out of which the controversy arises. It is not enough that they refer to or narrate the transaction after it is past; they must be so connected in time and circumstances with the principal fact as to be a part of it. When declarations of an agent or of a party himself are so closely connected with the principal fact as to be a part of the *res gestæ*, is often a very nice question to determine. There are on the point many decisions which appear difficult to reconcile with each other. Reference to a few of them will be sufficient.

Declarations of the captain of a steamer as to the cause of an accident, made two and a half days after the accident, but on the same voyage, were excluded. *Packet Company v. Clough*, 20 Wall. 528.

Where the accident happened while a passenger was getting on a car, the declaration of a brakeman, made a short time after, that the train should have stopped longer, was held inadmissible, because not a statement explanatory of anything in which he was then engaged, but relating to a past transaction. *Michigan Central R. Co. v. Coleman*, 28 Mich. 440.

Statements of the locomotive engineer, made a few days after an accident, as to its cause, held inadmissible. *Robinson v. Fitchburg & Worcester R. Co.*, 7 Gray, 92. Statement of a party injured by a railroad accident, relating how it occurred, immediately after the accident, held no part of the *res gestæ*. *Cleveland, Columbus, etc., R. Co. v. Mara*, 26 Ohio St. 185. Declarations of the locomotive engineer as to a railroad accident, made some time after and distinct from it, held inadmissible. *Michigan Central R. Co. v. Gougar*, 55 Ill. 503. Subsequent declarations of a brakeman, as to how

a car was burned, held inadmissible. *Michigan Central R. Co. v. Carrow*, 73 Ill. 348. In a case of collision between two trains, the subsequent statement of a flagman, how far he had gone back to flag the coming train, held inadmissible. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339. The statement of an omnibus conductor, immediately after an accident, as to the conduct and character of the driver, held no part of the *res gestæ*. *Agassiz v. London Tramway Co.*, Fisher's Ann. Dig. 1878, p. 246.

In *Luby v. Hudson River R. Co.*, 17 N. Y. 131, the plaintiff was run against and injured by a car drawn by horses. The car was stopped, and the driver arrested by a policeman. In the trial the policeman was allowed to testify that, upon arresting the driver as he was getting off the car and out of the crowd surrounding it, he asked him why he did not stop the car, to which the driver replied the brake was out of order. This was held error. The court said: "The declaration was no part of the driver's act for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." It may be remarked in regard to this case, and also several others of the cases cited, that, while the statement appears to have been closely connected in time with the principal fact, it was made to a stranger to the principal's business, and in narration of what had just occurred.

On the other hand, the declaration of a person stabbed, as to who stabbed him, made within twenty seconds after it, was held a part of the *res gestæ*, and admitted, on the ground that it was not a narrative statement of a past transaction, but an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it. *Commonwealth v. Hackett*, 2 Allen, 136.

So, where the thing to be established was that a death was caused by accident, it being shown that the person arose and

went down stairs in the night, his statement on his return that he had fallen down stairs and hurt himself badly was held a part of the *res gestæ*. *Insurance Company v. Mosley*, 8 Wall. 397.

So, where the action was for injury from a train of cars running over plaintiff's wagon and horses, driven by his servant, it was held the defendant might prove a conversation with the servant at the time of the accident and in relation to it. *Toledo & Wabash Ry. Co. v. Goddard*, 25 Ind. 185.

In an action against a railroad company for damages caused by delay in the carriage of cattle, the statements relating to the delay of the conductor, made while he had control of the train in which the cattle were, were held part of the *res gestæ*. *Sisson v. Cleveland & Toledo R. Co.*, 14 Mich. 489.

In an action against a railroad company for wrongful expulsion from one of its trains, a conversation had immediately after the expulsion, and serving to illustrate its character, between plaintiff and the offending brakeman, was held part of the *res gestæ*. *Bass v. Chicago & Northwestern Ry. Co.*, 42 Wis. 654.

The declarations of a person injured, (from which he afterwards died,) as to the cause of the injury, and made immediately after, and growing directly out of the happening of the fact, were held part of the *res gestæ*. *Brownell v. Pacific R. Co.*, 47 Mo. 239. So, the declaration of a person injured, as to how she was injured, made from one to four hours afterwards to her physician, was held admissible. *Harriman v. Stowe*, 57 Mo. 93.

The accident being the running of a railroad train against a peddler's wagon, and the destruction of his goods, the trial court admitted evidence of what was said at the time of the accident, by the engineer in charge of the train, as to negligence in running it. This was held no error by the supreme court, which said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along

the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

It must be apparent that, in case of accidents, declarations which will give quality and character to and illustrate them will nearly always be made after and not before they happen, so that if such declarations are to be excluded because not exactly contemporaneous with the main fact, they will very rarely, if ever, be admitted. No case has distinctly laid down the rule that they are not part of the *res gestæ* merely because made after the main fact, without regard to how long after. How long after the fact they may be made, and still be admissible, must depend on the circumstances of each particular case.

In *Lund v. Tyngsborough*, 9 Cush. 36, the court said: "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence." And in regard to the question of time: "So declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point;" and, "In general, the *res gestæ* mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described."

We have made these quotations because that is an instructive case, and states, perhaps more clearly than any other, the principles which are to serve as a guide on this subject. The

declarations, while they need not be exactly contemporaneous with the fact, must be "so connected with it as to constitute one transaction, and so as to derive credit from the act itself;" and they must "grow out of the main transaction." All the cases concede these propositions. But, in reference to declarations after the main fact has happened, what is meant by "connected with" and "growing out of it?" We take it to be this: that the declaration must be caused or produced by the fact; as, in the case in 2 Allen, the exclamation or statement as to who did the stabbing was caused by the fact of stabbing, no other cause appearing to have intervened to cause the statement. And so, in the case in 8 Wall., no other cause for the statement but the accident could have influenced the party making it. And in the case in 55 Pa. St., the declarations were evidently produced by the accident and its results. But in the case in 17 N. Y., although the declaration of the driver was made immediately after the fact, it was evident that there might be another cause for it than the accident itself—to wit, the driver's desire to shield himself from blame.

It is evident that whether the declaration is directly connected with, and growing out of, the main fact, does not depend on the time which has elapsed between them, though it must always be an important element in the consideration of the question; a considerable time may elapse, and yet the declaration be a part of the *res gestæ*. It may be made immediately upon the fact, and the circumstances be such as to exclude it. Each case must depend on its own peculiar circumstances, and be determined by the exercise of sound judicial discretion. We are of opinion that the declaration of the engineer to the conductor, made as it was immediately after the accident, by one person then engaged in the defendant's business to another similarly employed, in reference to what had just occurred, and what they were then at in consequence of such occurrence, there not appearing any cause other than such occurrence to produce or influence the decla-

ration, was connected with, and grew directly out of, the main fact—the accident—so as to be a part of the same transaction, and that there was no error in admitting it. ●

Order affirmed.

JERRY E. BAILEY vs. MARTIN S. CHANDLER.

September 13, 1880.

Suit against Sheriff—Service of Affidavit.—When property has been levied on and taken by a sheriff from the actual possession of the owner, on a writ against another person, the owner need not serve on the sheriff an affidavit of his ownership before bringing action against the sheriff. Evidence *held* sufficient to sustain the verdict.

Appeal by defendant from an order of the district court for Goodhue county, *Crosby*, J., presiding, refusing a new trial.

L. Van Slyck, for appellant.

J. C. McClure, for respondent.

GILFILLAN, C. J. On the good faith of the transaction between plaintiff and E. S. Bailey, the evidence is such that the verdict is conclusive.

We are inclined to think the affidavit served by plaintiff on the sheriff good, though we do not decide the point, for, the property having been taken from the possession of the plaintiff, no affidavit was necessary. *Butler v. White*, 25 Minn. 432; *Moulton v. Thompson*, 26 Minn. 120; *Jones v. Town*, 26 Minn. 172.

Order affirmed.

CHARLES M. STANDISH vs. OLE F. VOSBERG.

September 13, 1880.

97	175
43	175
27	175
61	330
27	175
69	471

Foreclosure Sale for Instalment.—Decision in *Fowler v. Johnson*, 26 Minn. 338, that one foreclosure sale under a mortgage, though only for an instalment of the mortgage debt, exhausts the mortgage lien on the real estate sold, adhered to.

Same — Effect of Redemption by Mortgagor.—A foreclosure sale, however, which, before it becomes complete by expiration of the time allowed for redemption, is annulled by the owner of the real estate redeeming, does not affect the lien of the mortgage for the other instalments of the mortgage debt.

Appeal by plaintiff from an order of the district court for Goodhue county, *Crosby J.*, presiding, sustaining a demurrer to the complaint.

F. W. Hoyt, for appellant.

James W. Bass, for respondent.

GILFILLAN, C. J. In this case the mortgagee, the plaintiff, had proceeded to foreclose under the power, to collect an instalment of interest due, by sale of the real estate mortgaged. Before the time to redeem from such sale expired, the mortgagor redeemed. This action was subsequently brought to foreclose the mortgage against the same property for the remainder of the debt. The complaint set forth what had been done in respect to foreclosing for the instalment. On demurrer to the complaint it was claimed that the lien of the mortgage was wholly exhausted by those proceedings. The court below, perhaps misled by the language of this court in *Fowler v. Johnson*, 26 Minn. 338, held this to be the case and sustained the demurrer. We allowed a reargument of that question in this case, and also in *Fowler v. Johnson*. We see no reason to doubt the correctness of that decision. In that case we decided that a foreclosure sale, even for an instalment, exhausted the lien of the mortgage on the tract sold; that there can be but one sale of the same tract under the mortgage, though it be payable in instalments. We did not

intend, however, to give that effect to an invalid sale, nor to one which has been made void, nor to an incomplete sale.

It has always been held by this court that, under the statute, a foreclosure is not complete, so as to operate as a sale, until the time allowed by statute for redemption has expired; that till then the title does not pass. *Daniels v. Smith*, 4 Minn. 117 (172;); *Donnelly v. Simonton*, 7 Minn. 110 (167;); *Horton v. Maffitt*, 14 Minn. 289.

The statute has always been that a redemption by the owner, his heirs or assigns, "annuls the sale." In *Daniels v. Smith*, a mortgage on one tract, payable in three instalments, was foreclosed under the power for the first instalment, and the owner redeemed. The second instalment was satisfied without recourse to the mortgage, and the mortgagee afterwards foreclosed under the power for the third instalment. It was claimed that the first foreclosure proceedings exhausted the lien. The court held that they did not, and said: "The effect of this redemption by Daniels (the owner) was simply to render null and void the sale and the certificate thereof made by the sheriff, and to cancel the mortgage and its lien upon the land for the first instalment. The effect is exactly what it would have been had Daniels paid the first note when it fell due, without any foreclosure and sale."

Warren v. Fish, 7 Minn. 432, was the case of an execution sale and redemption by the owner. The statute as to the effect of redemption by the owner from execution sale, is the same as in regard to such redemption from mortgage sale—it "annuls the sale." Of redemption by the owner, the court said: "It terminated the sale, and restored him to his estate exactly as it was before the sale took place, except that the judgment upon which the sale was made was satisfied. All other liens, prior and subsequent, remained unimpaired."

In *Rutherford v. Newman*, 8 Minn. 28, (47,) also a case of execution sale and redemption by the owner, the court repeated what it had said in *Warren v. Fish*, and added: "In other words, a redemption by the judgment debtor, or his

successor in interest, destroys the effect of the sale as such, and applies the money realized thereby as a payment upon the judgment, or other lien, upon which the property was sold." A foreclosure sale, which is annulled by redemption, never becomes complete; is not, after being so annulled, a sale, and can have no force or effect as a sale. It does not affect the lien of the mortgage for other instalments of the mortgage debt.

Order reversed.

27	177
45	351

CLEVELAND CO-OPERATIVE STOVE COMPANY vs. W. S. DOUGLAS.

September 13, 1880.

Confession of Judgment.—Statement for judgment by confession *held* sufficient.

One Hunter, as assignee of the defendant under a general assignment for the benefit of his creditors, moved in the district court for Clay county, to set aside a judgment by confession in that court. The motion was granted by *Stearns, J.*, and the plaintiff appealed.

Briggs & Elders, for appellant.

Burnham & Gould, for respondent.

GILFILLAN, C. J. The statement for the confession of judgment in this case was as follows:

"*State of Minnesota, County of Clay, ss.:* I, W. S. Douglas, of the village of Moorhead, in said county, hereby confess myself indebted to the Cleveland Co-operative Stove Company, of Cleveland, Ohio, in the sum of ten hundred and sixty-five dollars, (\$1,065,) and authorize the clerk of the district court, in and for said county, to enter judgment against me, and in favor of said Cleveland Co-operative Stove Company, for said sum of \$1,065.

"The said sum of money is due on three certain promissory notes dated March 28, 1878,—one note for \$429.77, due September 28, 1878; one note for \$429.77, due November 28, 1878; one note for \$429.77, due January 28, 1879. On the first of these notes an endorsement of \$150 was made January 16, 1879, and on said note a further payment was made February 5, 1879, of \$100. All of said notes were given by me to said Cleveland Co-operative Stove Company, to secure the payment of said sums of money on purchase of merchandise, and I hereby state that the sum by me above confessed is justly due to the said Cleveland Co-operative Stove Company, in pursuance of the facts above stated."

This was duly signed and verified. This shows as fully the facts out of which the indebtedness arose, and that it is justly due, as the statement for confession of judgment in *Kern v. Chalfant*, 7 Minn. 393, (487,) which was held sufficient by this court. We do not see why this statement is not sufficient.

Order reversed.

CATHERINE KELLER vs. SIOUX CITY & ST. PAUL RAILROAD
COMPANY.

September 13, 1880.

Husband and Wife—Declarations—Res Gestæ.—Where husband and wife were travelling together on a railroad, and she was injured, his narration of how the injury occurred, made in response to an inquiry by a third person, not under such circumstances as called on her to respond to the narration, is not evidence against her in an action by her to recover for the injury.

Railway—Stopping at Stations.—Rule as to the length of time railroad cars should stop at a station to allow passengers to alight.

Evidence—Damages.—Evidence held sufficient to sustain the verdict. Damages held not excessive.

Appeal by defendant from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial after a verdict of \$975 for plaintiff. At the trial the defendant offered to prove a statement of plaintiff's husband, (who was travelling with her,) as to the cause of the accident to plaintiff, the statement having been made in answer to a question put to him by the witness—a hotel-keeper. The witness had been at the station when the train arrived, had secured four guests for his hotel, had taken them thither—a distance of about 25 rods from the station—and registered their names, and then had at once returned to the station at the request of a physician who informed him that an old lady had been injured there, and that his help was needed; and upon arriving at the station he heard the statement in question. The testimony was excluded on plaintiff's objection, and the defendant excepted.

In charging the jury, the court gave the plaintiff's fourth request, as follows: "The law imposes upon a common carrier of passengers for hire the utmost human care and foresight for the safety of the passengers, and holds him responsible for the slightest neglect."

The defendant's requests and the action of the court thereon are thus stated in the record: "The requests of the defendant I have been asked to give, and in respect to them I charge: * * * 4. That if the jury find that the plaintiff and her husband were at the car door ready to alight when the train stopped at Sheldon, the defendant was not bound to hold its train there a longer time, so far as plaintiff was concerned, than to allow her to go from the car door aforesaid to and down the car steps to the platform at that place, she using ordinary diligence and celerity in her movements: provided you find that the train stopped long enough at the station to afford a reasonable time for passengers to alight with safety."

"5. That in such case, if the jury find that the plaintiff did not seasonably move forward to leave the car, or was dilatory or careless in her movements, and that such conduct on her

part contributed to or caused the injuries she received, then she cannot recover: provided you find that the train stopped long enough at the station to afford a reasonable time for passengers to alight."

The defendant excepted to all that part of each of these instructions from the word "provided" to the end of the instruction.

The defendant also excepted to the refusal of the court to give the ninth instruction requested by it, which was as follows: "That the condition of the platform south of the station building, at the time of the accident referred to in the evidence, has no bearing on the liability of the defendant in this action." The remaining exceptions are stated in the opinion.

E. C. Palmer, for appellant.

Davis, O'Brien & Wilson, for respondent.

GILFILLAN, C. J. The declaration of plaintiff's husband was not admissible as evidence. It does not appear to have been made in her hearing, under circumstances that called on her to respond to it, nor under such circumstances as made it a part of the *res gestæ*. It was evidently a narration of a past fact, made merely to satisfy the curiosity of a person who inquired about it.

The plaintiff, aged 67, entered defendant's cars as a passenger at Mankato, to be conveyed to Sheldon station, Iowa. She was safely carried to Sheldon, and was injured at that place while getting off the car, by reason, as she claims, of the train starting as she was getting off, it not having stopped long enough to enable her to alight with safety; and, as defendant claims, of her attempting to get off when the train, after stopping a proper length of time, had started again. The principal fact litigated appears to have been, did the train stop a proper length of time? On this point the court, in its general charge, instructed the jury that railroad companies carrying passengers are required "to have safe and convenient platforms or landing-places for the convenience

of passengers, and to stop long enough to give passengers time to leave the train in safety. This rule does not require them to wait an unusual time to enable sick or disabled persons to get off, unless they have notice or knowledge of the condition of such persons; but, if there is such a passenger, and his condition is known to them, they are required to allow a reasonable time for such person to safely reach the platform or landing-place." No exception was taken to this instruction in the general charge, but it was substantially repeated, upon plaintiff's first and second requests, and then excepted to. The court also, upon plaintiff's third request, instructed that "if the defendant knew or might have known, in the exercise of reasonable care, that the plaintiff was in the act of leaving the train, but had not succeeded in getting off from it, it had no right to start such train while she was in such act; and if it did so, and the plaintiff suffered bodily injury thereby, she is entitled to your verdict," and this was excepted to. As the court had already, in its general charge, and also on defendant's request, clearly and unmistakably instructed upon the effect of contributory negligence on the part of plaintiff, we do not think this request vitiated by not referring to it again, nor is that objection to it made here.

The rule stated by the court below, as to the length of time which railroad carriers of passengers ought to stop their trains to allow passengers to get off at their places of destination, is correct. When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary delay, and the company's to give him a reasonable opportunity to do so with safety. The exact length of time to be given must depend very largely upon circumstances. For instance, a longer time would be required when there are many passengers to alight than when there are but few; in a dark night, with the landing-place badly lighted, than when there is full light; at a difficult place to alight, than where it is easy. And as railroad companies usually carry

not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight. Those in charge of the trains are bound to presume that there may be such persons in the cars, and, unless they know there are not, they have no right to start the trains until they have waited long enough to allow such persons to alight; nor, even after waiting a reasonable time for such persons to get off, have they a right to start the trains without using reasonable care to ascertain if there are such persons in the act of getting off. It certainly would not be permissible for them to be so reckless of the lives and limbs of passengers as to start the trains when they know, or with reasonable care might know, that passengers are in the act of alighting.

Some of the requests on the part of defendant assume that, if the other passengers for Sheldon had alighted, then the train might move on. Such an instruction would be apt to mislead the jury to plaintiff's prejudice, for the other Sheldon passengers may have been able to get off in less than the time that, as we have indicated, the train was bound to stop. The fact that they had got off was only evidence, but not conclusive, that the train had stopped a proper time. The instruction which appears from the record as though it were given on defendant's second request, states that the defendant was not bound to wait after those passengers had got off, unless some officer or employe knew, or, in the exercise of reasonable care, might have known, that plaintiff had not left, or was in the act of leaving. The train was bound, notwithstanding those other passengers may have got off, to wait a proper time, as we have indicated, to allow passengers—not merely the young, strong and active, but the aged and more infirm—to get off; and, if it had not waited such proper time, those in charge of the train had no right to start it, unless there

was, in fact, no passenger who needed a longer time to get off. If there was such passenger, and the train had not stopped the proper time, those in charge of the train were bound to know it. The instruction as given was too favorable to defendant, because it assumes the right to start the train as soon as the other passengers were off, unless those in charge knew, or might have known, that the plaintiff needed longer time.

The settled case does not make it appear whether the qualifications to the general propositions, in what seem to be defendant's fourth and fifth requests, were in the original requests, or were added by the court. We may conjecture, from the fact that defendant excepted to the qualifications, that they were added, by the court, to the requests as originally made. But error must clearly appear. It cannot be made out by inference and conjecture. For this reason we do not consider the exceptions to these qualifications. Whether the condition of the platform contributed to cause or increase the injury to plaintiff, was for the jury to determine. The court was, therefore, right in refusing defendant's ninth request.

The plaintiff's fourth request is unquestioned law; but it is claimed that, so far as this case is concerned, it is an abstract proposition of law, not applicable to the case, and that the jury may have been misled by it. In view of the very definite statement by the court, several times repeated, of the duty and obligation of the defendant in the particular circumstances of the case, and on which its liability in the case depends, it is impossible to conceive that the jury could have been misled by this instruction. On the evidence, the case was clearly one for the jury. Nor, although the verdict is, under the circumstances, a large one, do we see any reason to suppose the jury was influenced by any consideration except the desire to fairly and adequately compensate plaintiff for the injury sustained.

Order affirmed.

27 184
43 516

ELIHU SMITH vs. JAMES M. LYTLE and another.

September 24, 1880.

Sale of Land on Execution against a Purchaser having only an Equitable Interest.—A sale on execution of an estate in fee in real property, where the judgment debtor has only an equitable interest therein, under a contract of purchase, and such interest only is authorized and directed to be sold by the process, is void as against the vendor in the contract, or his grantee, who holds the legal title, and has a prior lien upon the property for the unpaid purchase-money.

Plaintiff brought this action in the district court for Nobles county, praying that a sheriff's certificate of sale, executed and delivered to defendant Lytle, of certain real estate in that county, and also a deed of the same real estate from Lytle to the other defendant, Thompson, be adjudged void and cancelled. The defendants answered, and the action was tried before *Dickinson, J.*, whose findings of fact and conclusions of law were in substance as follows:

The land in question is a village lot in Worthington with a dwelling-house thereon, the property being worth \$1,500. In August, 1873, one Lackor entered into a written contract with the Sioux City & St. Paul Railroad Co., which then owned the lot, for the purchase of it. The lot was then vacant. Lackor paid part only of the purchase-money, went into possession, built the dwelling-house now standing on the lot, and in February, 1874, moved into the house with his family, and thereafter occupied it as his homestead.

In April, 1874, the plaintiff, Smith, lent Lackor a large sum of money, and, as security for its repayment, took from him an assignment in writing of his contract with the railroad company. Lackor's wife did not join in the assignment. On December 16, 1874, plaintiff, to protect his rights under the assignment, paid to the railroad company the unpaid balance of the purchase-money of the land required by the contract to be paid by Lackor, amounting to \$142, and thereupon the company executed and delivered to plaintiff a

deed of conveyance of the land. In August, 1875, plaintiff brought suit against Lackor to foreclose his interest in the property, and to enforce the security. Issue was joined, and the action tried by the court, and judgment ordered for the recovery by Smith from Lackor of \$1,454.13, including the \$142 paid by Smith to the railroad company, with interest and costs; and that as to this sum of \$142, with interest and costs, the judgment be a specific lien on the property, "and that the same be sold in accordance with the statute in such case made and provided, to satisfy such lien; and that defendant Lackor be decreed to be the equitable owner of the said premises, discharged of any lien or title in favor of the plaintiff on account of such assignment, except as to the said sum of \$142 and interest and costs; and that, upon satisfaction of such lien, either by payment or upon sale of the premises and redemption therefrom, the plaintiff be adjudged to reconvey the said premises to defendant Lackor, by proper deed of conveyance." See *Smith v. Lackor*, 25 Minn. 454.

On June 5, 1876, pursuant to this order, judgment was entered, directing that the premises "be sold in accordance with the statute in such case made and provided, to satisfy such lien," without specifying more particularly the manner in which it should be enforced or executed. The amount of the lien with interest and costs was \$173.74. The judgment was docketed as an ordinary judgment for the recovery of the entire amount adjudged to Smith in the action, and on June 6, 1876, execution was taken out, in the ordinary form, except that it referred to the judgment as a judgment "for the sum of \$173.74, adjudged to be a specific lien upon lot 6, in block 34, in the village of Worthington, in said county and state, and that the same be sold to satisfy such lien." In other respects the execution was in the form prescribed by Gen. St. 1878, c. 66, § 295, subd. 1. It recited that \$173.74 was due on the judgment, and directed the sheriff to satisfy the same in the manner provided in the section and subdivision referred to. On the same day, by virtue of the execution,

the sheriff levied on the property in question, and, after due notice, sold it at public auction to the plaintiff, Smith, for \$201.54, and returned the execution fully satisfied. No report of the sale was made to the court, nor confirmation by the court sought. The ordinary sheriff's certificate of sale on execution was made and delivered to Smith, and recorded. No redemption was ever made from the sale. On January 4, 1877, Lackor and wife, for a valuable consideration, executed and delivered to Smith a deed of conveyance (without covenants) of all their right, title and interest, claim or demand, in and to the land.

The defendant Lytle, having become entitled to a mechanic's lien against Lackor, for labor in building the dwelling-house on the lot between August 11, 1873, and December 17, 1873, amounting to \$146.80, and having filed the proper account in the registry of deeds, brought suit in May, 1875, to enforce such lien, making Lackor, Smith (the now plaintiff) and one Sheldon parties defendant, all of whom made default. On September 18, 1875, the court, on the evidence taken and reported to it, found the above facts entitling Lytle to a lien, and further found that Lackor was not the owner in fee of the land upon which the dwelling-house stood, but that he held a contract for the purchase of it, by the terms of which the land was to be conveyed to him on payment of the purchase price, a part only of which had then been paid by him. The court also found that Lytle was entitled to recover from Lackor the sum of \$146.80, with interest from December 17, 1873, and that judgment should be entered therefor, "and the same be decreed to be a specific charge and lien upon the said dwelling-house standing upon said lot, and upon all the right, title and interest of the said Lackor in and to the said lot of land upon which the same is situated; and that execution be issued upon such judgment, and thereupon the said property upon which such judgment shall be declared to be a lien shall be sold or leased as provided by law, to satisfy such judgment." In accordance with the findings and order, judg-

ment was entered on September 23, 1875, adjudging a recovery of \$146.80, with interest, etc., and that the same be "a specific charge and lien upon the said building, dwelling-house, situated on said land, and upon all the right, title and interest of the said Lackor in and to the said lot of land upon which the same is situated; and that said lien shall remain and be enforced by sale or lease of said premises, dwelling-house and appurtenances, by virtue of an execution therefor or therein."

This judgment having been docketed, an execution thereon was issued, in the ordinary form of executions against property prescribed in Gen. St. 1878, c. 66, § 295, subd. 1, except that, after the command to the officer to satisfy such judgment, etc., out of the personal property, etc., and, if sufficient personal property could not be found, then out of the real property belonging to said judgment debtor, there was added, "or out of the property on which said judgment was adjudged and declared to be a lien." Lytle's attorney, by indorsement on the execution, directed the sheriff to "levy upon the dwelling-house and appurtenances upon said lot, and all the right, title, and interest of said H. L. Lackor in and to said lot of land." The sheriff, by virtue of the execution, levied on the lot of land and the dwelling-house thereon, and, after due notice, sold the whole property at public auction on November 17, 1875, to Lytle, for the sum of \$225.50, and executed and delivered to him the usual sheriff's certificate of sale on execution, which was recorded. No redemption was made from this sale by any one.

Lackor was desirous that the property should be sold rather than leased by the sheriff, in order that he might retain possession during the year for redemption, but the sale was made, not because Lackor desired it, but voluntarily by those acting for Lytle under the judgment.

After this sale to Lytle and before the expiration of the time for redemption, the plaintiff, Smith, negotiated with Lytle for a purchase of Lytle's interest acquired under the

sale, intending to procure an assignment of such interest, or, if he failed in that, to redeem from the sale. Before he acquired such interest, the negotiations were interrupted by the expiration of the time for redemption. Smith, for his guidance in respect to the matter of redemption, made inquiry of the clerk of the court, who had acted as Lytle's attorney in foreclosing the mechanic's lien, as to the time when the right to redeem would expire, who, by mistake, misinformed him, so that the time for redemption expired before Smith was aware of the true date of its expiration. In this way he failed to make redemption.

After the time for redemption had expired, the defendant Thompson purposing to buy from Lytle, Smith requested him to forbear for a certain time from negotiating with Lytle, to enable Smith himself to buy from Lytle, and thus protect his own lien on the property, with which request Thompson complied. Thompson had the same knowledge Smith had of all the facts affecting the title. Smith did not assert any title in himself superior to Lytle's, nor did he question the validity of Lytle's title, but supposed that Lytle had acquired a title which extinguished his own interest, and so spoke of it in his conversation with Thompson; but his statements to Thompson were not intended by him as an act of relinquishment of any claim on his part, nor were they so understood by Thompson. Smith, failing to effect a purchase within the time agreed, was informed by Thompson that unless he effected a purchase within a further time named, Thompson himself would purchase. Smith failed to do so within such time, and afterwards, and on December 13, 1876, Thompson purchased the premises from Lytle for \$600, besides some taxes assumed, and paid by Thompson, and received from Lytle a warranty deed with the usual covenants. Thompson paid \$300 down, and afterward paid \$225, of the purchase price. After Thompson's purchase, Smith attempted to repurchase from him.

On November 24, 1876, after the time for redemption from

the sale to Lytle had expired, Smith brought suit against Lytle for specific performance of an alleged contract for the assignment to him by Lytle of the sheriff's certificate given to Lytle, and of all the latter's right, title, interest, claim and demand in or to the property. Lytle joined issue, and Thompson, after his purchase, was allowed to and did intervene. The action was dismissed, after a trial, the court finding that there had been a mutual mistake of fact by the contracting parties which avoided the agreement. Judgment of dismissal was entered on October 30, 1877.

Among other conclusions of law, the court found that the sale to Lytle under execution, though irregular, was merely irregular and voidable, and was not void; and that plaintiff, having taken no steps to impeach its validity until more than a year after the sale, when the purchaser's title became absolute, though he had actual notice of the sale and negotiated with the persons holding under it for a purchase from them, should be deemed to have waived the defects in the sale, and ought not now to be heard to question the title thus derived, especially after a transfer of the title to a purchaser for a valuable consideration. Judgment was accordingly ordered and entered, dismissing the complaint, and the plaintiff appealed.

Gordon E. Cole, M. J. Severance and Emory Clark, for appellant.

Daniel Rohrer, for respondents.

CORNELL, J. In paying to the railroad company the unpaid portion of the purchase-money coming to it upon its contract of sale to Lackor, and taking a transfer of the legal title, Smith did not make the advance for or on account of Lackor, or in the way of a loan to him. It was not done in pursuance of any agreement between him and Lackor, and the assignment of the contract of purchase from Lackor to him contained no stipulation obligating him to make the advance or to procure the title. He did it voluntarily and solely for the purpose of protecting an equitable interest in

the property which he supposed he had acquired from Lackor, and was holding as security for a loan of money made to him. He was placed by the transaction, therefore, in precisely the position he would have occupied if he had never had any dealings whatever with Lackor, but had bought of the railroad company all its estate and interest in the property, and had taken a conveyance of the legal title to the lot, subject to the equitable rights of Lackor under his contract of purchase from the company.

He has succeeded to all the legal and equitable rights of the company under its contract of sale to Lackor, and has become subject to all its obligations. These rights and obligations are those existing between a vendor and vendee of real property, where a portion of the purchase-money remains unpaid, and the legal title is being withheld until full payment is made. Lackor, as the vendee, became the equitable owner of the lot, and a trustee for Smith as to the unpaid portion of the purchase-money; while the latter, as vendor, held the legal title as a trustee for Lackor, with a prior lien upon the lot for the unpaid purchase-money, as against the vendee and all parties claiming under him. 1 Story's Eq. Jur. § 506; 2 Story's Eq. Jur. §§ 789, 790, 1216, 1217, *et seq.* Plaintiff's lien, therefore, under his judgment against Lackor, to the extent of said unpaid purchase-money, interest and costs, was prior and paramount, and not subordinate, to that which was subsequently obtained by Lytle against the equitable interest and estate of Lackor in the premises, and it could not be affected by any proceedings taken to enforce payment of the latter; for it is too plain for argument that a second lien, which is only a charge upon an equitable title and estate, cannot be used or made available to cut off or destroy a prior lien, which is a charge upon the land itself, affecting both the legal and equitable title.

The judgment under which defendants claim title does not purport to impeach the validity of plaintiff's prior lien, nor to determine any question of priority between it and the me-

chanic's lien which was asserted in that action by Lytle. It only determined the rights of Lytle, under his alleged claim of lien, as against Lackor, on account of the erection of the dwelling-house upon the said lot; the only title to which, that belonged to him, according to the findings in pursuance of which the judgment was rendered, was the equitable one of a vendee, under a contract of purchase, the purchase-money being still in part unpaid; and it adjudged the amount of the lien, by it determined, to be "a specific charge and lien upon said building, and upon all the right, title, and interest of Lackor in and to the land on which it was situated." This subjected to the lien of the judgment whatever equitable rights and interest Lackor had in the premises, but nothing more. It did not reach the fee of the land, nor any prior lien thereon belonging to Smith; and, upon the findings, that could not properly have been done, as it would in effect have been subjecting to the payment of Lackor's debt the property of Smith, without his consent.

The circumstance that Smith was nominally a party defendant in the action is of no importance; for, as no rights of his, as a prior lien-holder or otherwise, were in any way involved or brought in question, it is evident that he was improperly made a party, and that any adjudication affecting his rights would have been error. *Forrer v. Klope*, 10 Neb. 373. But, as already stated, no adjudication of the kind was attempted, and no rights of plaintiff were sought to be passed upon or determined in that action. He stands, therefore, in respect to all subsequent proceedings that have been taken to enforce the judgment, in the same position he would occupy if he had never been made a party defendant; and he may impeach their validity within the same time, in like manner, and upon like grounds as would be permitted to any stranger to the judgment, whose property rights were injuriously affected thereby.

The sale of the lot to Lytle on the execution issued upon his judgment was wholly unauthorized and void, aside from

any considerations growing out of the provisions of the statute regulating the manner of enforcing mechanics' liens when buildings are erected for parties on land to which they have no legal title. The mandate of the process under which the officer here acted in making the sale, required him to satisfy the judgment out of the personal or real property of the judgment debtor, or "out of the property on which the judgment was adjudged and declared to be a lien;" and the direction endorsed upon the writ was "to levy upon the dwelling-house upon the lot, and all the right, title, and interest of the said H. L. Lackor in and to said lot of land." In assuming to sell the lot itself, and to pass the legal title thereto to the purchaser, the officer acted wholly outside the authority of his writ, and his acts were not merely irregular, but void. *Herman on Executions*, § 255, and cases there cited; *Harris v. Murray*, 28 N. Y. 574; *Jeffries v. Sherburn*, 21 Ind. 112.

It is suggested, however, that as Lackor consented to the sale of the lot on the execution, he cannot now be heard to question its validity as against Thompson, who has since purchased the property of Lytle and paid a valuable consideration therefor; and that Smith occupies the same position, because he is a grantee of Lackor under the deed of January, 1877. It is also urged that he has waived all defects and irregularities in the sheriff's sale by his laches in not taking any steps to set it aside for more than a year after the expiration of the time for redemption. The answer to these suggestions is that the rights which Smith is seeking to protect by this action are those of a prior lien-holder, and they were not derived from Lackor, but from the railroad company. These rights became vested in him before the conveyance from Lackor and wife in January, 1877, and they were unaffected by it. The prior equitable lien he then had did not become merged in the legal title he then acquired. The equitable doctrine of merger has no application where it is clearly for the interest of the party holding the two estates that they be kept separate and distinct, unless a contrary

intention is expressly shown. *Horton v. Maffitt*, 14 Minn. 289, 293. The existence of any such intention in this case is expressly negatived by the findings, and it was clearly for Smith's interest that the prior lien upon the property, which he got from the railroad company, should not merge in the legal title which he afterwards got of Lackor and wife. It is also established by the findings that neither the sale upon the execution, nor the purchase by Thompson, was induced or influenced by the conduct or representations of plaintiff, or any act or omission on his part, and that the former purchased with full knowledge of all the facts affecting his title, and of the existence of plaintiff's rights as a prior lien-holder. Under these circumstances, plaintiff is not precluded from asserting his rights against Thompson by reason of any estoppel or waiver.

The judgment of the district court must be reversed.

NANCY J. RICKER and others vs. THE CHARTER OAK LIFE
INSURANCE COMPANY, Defendant, and LOUISA
STANCHFIELD, Intervenor.

September 24, 1880.

Life Insurance—Surrender by Father of paid-up Policy on his own Life, payable to his Children.—S. procured of defendant company a policy of insurance for \$2,000 on his own life, payable on his death to his then wife, Elizabeth A., if then living, otherwise to his children; or, if minors, to their guardian for their use. His said wife died first, leaving her husband and plaintiffs, their children, surviving. At her death all the premiums, which constituted the consideration for the policy, had been paid. Afterwards S. married the intervenor, by whom he had one child. After his second marriage he surrendered to the company, without the consent of his children, said policy, and took in consideration thereof, and in lieu of the original, a paid-up policy corresponding in date and terms with the original, save that it was made payable to his said second wife, the intervenor herein, for her benefit. *Held*, that such surrender was invalid and of no effect as against his children, and that "his children" included the issue of both marriages.

Appeal by the intervenor, Louisa Stanchfield, from an order of the district court for Hennepin county, *Young, J.*, presiding, sustaining the plaintiffs' demurrer to her complaint. The action was brought by the children of Samuel Stanchfield, by his first wife, upon the original policy of insurance mentioned in the opinion, and the intervenor, in her complaint, alleged the surrender of that policy, and the issuance of the second policy mentioned in the opinion, payable to herself.

Lochren, McNair & Gilfillan, for appellant.

Woods & Babcock, for respondents.

CORNELL, J. The original policy was issued upon the application of Samuel Stanchfield, the person whose life was insured, and all the premiums stipulated for were paid by him before the death of Elizabeth A. Stanchfield, who was his wife. By its terms the amount of the insurance was made payable, upon the death of the insured, to Elizabeth A. Stanchfield, his said wife, and, in case of her death before his decease, the same was to be paid to his children, or to their guardian, if minors, for their use and benefit. The said Elizabeth died intestate in July, 1874, leaving surviving her said husband, the plaintiffs herein, and one Joel B. Stanchfield, who were the issue of their marriage. After this Samuel Stanchfield married the intervenor herein, by whom he had one child, Carl S. Stanchfield, both of whom are now living. On February 13, 1878, Samuel Stanchfield died. After the decease of his former wife and his marriage with the intervenor, Louisa Stanchfield, the insured surrendered the original policy, which was cancelled, and a new one was issued in its place and as a substitute therefor, bearing the same date, and containing the same terms and conditions, save that it was therein provided that it should enure "to the sole and separate use and benefit" of said intervenor, Louisa Stanchfield, his second wife. The legal effect of this surrender and change, and the competency of Samuel Stanchfield to make it without the consent of his children, are the important questions presented for adjudication in this case.

Upon the allegations and admissions in the pleadings it must be presumed that the original policy was made, and its stipulations were to be performed, in the state of Connecticut, where the defendant company was created, organized, and did its business, and hence its legal effect, and the rights and obligations of the parties under it, depend upon the laws of that state; but as no evidence appears to have been given as to what those laws were, they are to be taken as identical with the common law of this state, independent of any statute upon the subject. Upon this theory the case has been argued, and it will be considered and determined accordingly.

The general rule upon the subject, as stated by Mr. Bliss, is this: "That a policy of life insurance, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person or persons so named. The person designated in the policy is the proper person to receipt for and to sue for the money. The principle is that the rights under the policy become vested immediately upon its being issued, so that no person other than those designated in it can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." Bliss on Life Ins. (2d Ed.) §§ 317, 337. This is held to be the rule in *The Succession of Kessler*, 23 La. 455.

Upon the facts in the case at bar, however, the court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance still remains unpaid, and where the policy is liable to forfeiture in case of non-payment. Here the entire amount of the premiums stipulated for in the policy had been paid before the death of the wife, Elizabeth A. Stanchfield, and the subsequent attempted surrender of the

policy by her husband, whose life was insured. The case, therefore, stands in the same position it would if the whole consideration for the policy had been paid by the party procuring it at the time of its execution and delivery by the company; and the question is, whether, having made such payment, and taken out a policy for the benefit of his said wife and his children, payable in express terms to her, or, in the event of her prior decease, to his children, it was competent for him to surrender the same and take another policy in consideration of such surrender, and in lieu of the original, for the benefit of another party?

This question, it seems to the court, must be answered in the negative. The transaction on the part of Mr. Stanchfield was in the nature of an irrevocable and executed voluntary settlement upon his wife and children of the sum secured to be paid by the policy at his death, conditioned that the same should be paid to her for her benefit should she survive him; but, if not, then the same should be paid to his children, or, if minors, to their guardian, for their sole use and benefit. Nothing remained to be done on his part to make the intended gift of the policy to the beneficiaries therein named complete and effectual as against himself and all mere volunteers claiming under him. In paying for the insurance and procuring the policy to be issued, payable in express terms, upon his death, to his said wife, Elizabeth, if then living, and if not to his children, for their sole use and benefit, without any condition or stipulation reserving a right to change or alter any of the terms of the agreement, he did all that could well be done, under the circumstances, in the execution of an intention to vest in his said appointees the entire interest in the policy, and all rights thereunder. *Adams v. Brackett*, 5 Met. 280; *Landrum v. Knowles*, 22 N. J. Eq. 594.

What he did was a "clear and distinct act," wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or

intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do, by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depository, without any interest, for those entitled thereto. Such conduct on the part of the husband and father was both natural and proper, and it raises no presumption against the theory of a completed transaction on his part, as evidenced by his other acts. As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained. We concur in the opinion of the district court that "his children" included the issue of both marriages.

Order affirmed.

**CHARLES A. COE and others vs. CALEDONIA & MISSISSIPPI
RAILWAY COMPANY, impleaded, etc.**

September 28, 1880.

27	197
39	427
27	197
45	233
27	197
61	187

Municipal Aid to Railways—Notice of Election—Time.—Under Sp. Laws 1875, c. 132, notice of the time, place and object of a meeting to vote upon the question of issuing bonds to aid in the construction of a railway was required to be posted in three public places "at least ten days prior" to such meeting. *Held*, that notices posted on the 13th day of May, of a meeting to be held on the 23rd day of the same month, were sufficient.

Same—Conditions on Issue of Bonds—Location of Station.—Sp. Laws 1875, c. 132, authorized certain villages and towns in certain counties "to issue bonds * * to aid in the construction of any railway running into, or proposed to be built through, either of the counties aforesaid." *Held*, that inasmuch as this act does not prohibit it, it is competent for the legal voters of such villages to impose such conditions upon an issue of bonds voted by them under the act as they may deem best, provided such conditions are not in violation of any express provision of statute, or not prohibited by any general rule of public policy. *Held*, that it is proper for such villages to impose, as one of such conditions, a condition as to the place where the depot of the railway proposed to be aided shall be located.

Same—Several Elections and Issues of Bonds.—*Held*, that there is nothing in said act to prevent the holding of more than one election, or the voting of more than one issue of bonds thereunder, the authority of such villages being unlimited in those respects.

Same—Constitutional Limitation of Amount.—The effect of certain votes of bonds, to be issued by the village of Caledonia, under certain acts of the legislature, considered (upon the facts appearing) with reference to that provision of the constitution which forbids the legislature to authorize any municipal corporation to issue bonds, or become indebted in any manner, to aid in the construction or equipment of any or all railroads, to any amount exceeding 10 per centum of the value of the taxable property of such corporation, as shown by the last assessment for taxation previous to the incurring of such indebtedness.

The plaintiffs, resident tax-payers and freeholders in the village of Caledonia, in Houston county, brought this action in the district court for that county to restrain the defendant Buell from delivering to the defendant railway company, and the railway company from receiving from him, certain bonds of the village, amounting to \$20,000, voted in aid of the railway, and executed by the town officers, and by them placed in escrow in the hands of defendant Buell. The railway company appeals from an order of *Page, J.*, overruling its demurrer to the complaint, the substance of which is stated in the opinion.

W. H. Harries and Cameron & Losey, for appellant.

Wilson & Gale, for respondents.

The petition on which the special election was called being coupled with the condition that the railway company should

erect and permanently locate its depot on the land described in it (the same mentioned in the opinion) was void, (1) because the act under which it was made provides for no conditions, and hence the petition was not in the form prescribed by the statute; (*Munson v. Town of Lyons*, 12 Blatch. 539; *People v. Adirondack Company*, 57 Barb. 656; *Musser v. Fairmont, etc., R. Co.*, 7 Am. Law Reg. 284; *Butternuts & Oxford Turnpike Co. v. North*, 1 Hill, 518; *Fort Edward R. Co. v. Payne*, 15 N.Y. 583;) and (2) because the condition for the location of the depot at a particular place as a condition of the bonus is against public policy. *Munson v. Town of Lyons*, 12 Blatch. 539; *Fuller v. Dame*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138; *Jacksonville, etc., R. Co. v. Mathers*, 71 Ill. 592; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kans. 602; *Marsh v. Railroad Co.*, 64 Ill. 414; *Holladay v. Paterson*, 5 Oregon, 177; *Williamson v. Chicago, Rock Island & Pac. R. Co.*, 4 N. W. Rep. (N. S.) 870. And the condition cannot be rejected as surplusage, but the whole contract must be held void. *Kimbrough v. Lane*, 11 Bush, 556; *Lindsay v. Smith*, 78 N. C. 328; *Alexander v. Owen*, 1 Term Rep. 225; *Wellyams v. Bullmore*, 32 Beav. 574; 1 Addison on Contracts, § 300.

The bonds are void because the notice of election on May 23, 1879, was posted on May 13, 1879, and less than ten days prior to the election called. Statutes authorizing municipal indebtedness in aid of railways must be strictly pursued. *Town of Wellsborough v. New York & Canada R. Co.*, 76 N. Y. 182; *People v. Hurlburt*, 46 N. Y. 110; *People v. Spencer*, 55 N. Y. 1; and in such proceedings the election is a nullity where the notice thereof is not given for the prescribed time. *Williams v. Roberts*, 88 Ill. 11; *People v. Hurlburt*, 46 N. Y. 110; *People v. Fort Edward*, 70 N. Y. 28. The statute requires the notice to be posted "at least ten days" prior to the election, and this means that ten clear days must elapse between the posting and the election, exclusive of the day of posting and that of the election. *Greve v. St. Paul, S. & T. F. R. Co.*, 25 Minn. 327; *Wilson v. Thompson*, 26 Minn. 299;

State v. Brown, 22 Minn. 482; *Rex v. Justices of Herefordshire*, 3 Barn. & Ald. 581; *Zouch v. Empsey*, 4 Barn. & Ald. 522; *Regina v. Justices of Shropshire*, 8 Ad. & El. 173; *In re Prangley*, 4 Ad. & El. 781; *Mitchell v. Foster*, 12 Ad. & El. 472; *Blunt v. Heslop*, 8 Ad. & El. 577; *Young v. Higgon*, 6 M. & W. 48; *Gorst v. Lowndes*, 11 Simons, 433; *Peables v. Hanaforl*, 18 Me. 106; *Buttrick v. Holden*, 8 Cush. 233; *Marvin v. Marvin*, 75 N. Y. 240; *Small v. Edrick*, 5 Wend. 187; *Phelan v. Douglass*, 11 How. Pr. 193; *Commercial Bank v. Ives*, 2 Hill, 355; *Judd v. Fulton*, 10 Barb. 117; *Miller v. Lefever*, 4 N. W. Rep. (N. S.) 929. In *Warsop v. City of Hastings*, 22 Minn. 437, the only question made by the appellant as to the notice of election was whether it was published prematurely, and the point now made was not made or passed on.

By the election of March 19, 1875, the power to vote aid under the act of 1875 was exhausted. *Jones on R. R. Securities*, § 268; *People v. Town of Waynesville*, 88 Ill. 469; *Danville v. Railroad Co.*, 43 Vt. 144; *State v. County Court of Daviess Coun'y*, 64 Mo. 30; *Musser v. Fairmont, etc., R. Co.*, 7 Am. Law Reg. 284.

BERRY, J. This is an appeal from an order overruling a demurrer to a complaint. The question is, does the complaint state facts constituting a cause of action?

The important allegations of the complaint are these: On March 11, 1874, the village of Caledonia voted to issue bonds to the defendant in the sum of \$12,000. This was done under Sp. Laws 1874, c. 59. On March 19, 1875, the village voted to issue bonds to the defendant in the sum of \$8,000, additional to the \$12,000 before voted. This was done under Sp. Laws 1875, c. 132. It does not appear that either of these votes was based upon any proposition or agreement upon the part of the defendant, nor that it has been followed by any action on the part of the defendant by which it has bound itself to perform the conditions upon which the bonds were to be issued, so as to create any mu-

tual engagement between it and the village; neither does it appear that the defendant has at any time claimed to be entitled to any of the bonds thus voted to be issued, or that it has demanded any of them, and none of them have been issued.

On May 23, 1879, the village voted to issue bonds to the defendant in the sum of \$20,000. This also was done under Sp. Laws 1875, c. 132. This vote was based upon a written proposition on the part of the defendant, by which it agrees, in consideration of \$20,000 of bonds to be voted and issued by the village, that it will "build and construct its railroad from Sumner, in the county of Houston and state of Minnesota, * * * to the said village of Caledonia, and have the cars and locomotives running thereon, and will build and erect its depot, and permanently locate the same, on the land reserved for that purpose by James H. Cooper, in his west addition to the village of Caledonia, and lying and being on the west side of Kingston street, in the corporate limits of said village of Caledonia, on or before the first day of October, 1879, and will not ask, demand or receive the bonds * * * mentioned, unless said railroad is so built and constructed, with the cars and locomotives running thereon, and the said depot is built and located at the place above designated: * * * *provided*, * that the said bonds be delivered into the hands of the Hon. D. L. Buell, in escrow, to be by him delivered to the said * * * company, only upon compliance with the foregoing proposition on the part of said company." The proposition, containing many other provisions in addition to those above recited, was in terms submitted to the voters of the village at the election at which the issue of \$20,000 was voted, and was in terms accepted by the village, and the bonds were accordingly executed and delivered to Buell in escrow.

1. Sp. Laws 1875, c. 132, under which this vote was had, provides for a special meeting of the legal voters of the village to vote upon the question of issuing bonds to aid in the

construction of a railway, and that notice of the time, place, and object of the meeting shall be posted in three public places, "at least ten days prior thereto." In the case before us, the notices were posted on the 13th of May, and the meeting held on the 23rd of the same month. The time of notice was sufficient. The general rule is that where notice is required to be posted or published a specified number of days before an event of which notice is to be given, the required number of days is computed by excluding the day of first posting or publishing, and including the day on which the event is to occur. *Worley v. Naylor*, 6 Minn. 123 (192;); *Arnold v. Nye*, 23 Mich. 286, 293. This is in accordance, also, with the rule prescribed by our statute with reference to the computation of time in civil actions. Gen. St. 1878, c. 66, § 82. No reason can be given why a different rule should obtain in cases arising otherwise than in civil actions, nor why the law should not be consistent in following the statutory rule in all instances to which it is logically applicable by analogy.

2. The plaintiff contends that the vote of May 23, 1879, to issue bonds to the amount of \$20,000, was unauthorized, and therefore void, on account of the condition in reference to the location of the depot. The statute (Sp. Laws 1875, c. 132,) authorizes the village of Caledonia, and other villages, etc., in Fillmore and Houston counties, to "issue bonds * * * to aid in the construction of any railway running into, or proposed to be built through, either of the counties aforesaid." Section 4 provides that upon a petition of ten freeholders of any such village, etc., for a special meeting of the legal voters thereof, "stating the sum in bonds desired to be furnished, and the railway proposed to be aided," it shall be the duty of the proper authorities to call such meeting, "stating in the notice thereof the time, place and object of the meeting." "The voters at such meeting shall vote upon the question by ballot. Those voting in favor of issuing bonds shall have written or printed on

their ballots the words, 'Shall bonds be issued? Yes.' Those opposed to issuing bonds shall have written or printed on their ballots the words, 'Shall bonds be issued? No.'"

The position of the plaintiff, in effect, is that these provisions of statute (and they are all that are important here) authorize the village of Caledonia simply to vote an issue of its bonds, in a designated amount, to aid in the construction of a designated railway, without any conditions of any kind. From this position we have no hesitation in dissenting. In direct opposition to it, we are of opinion that inasmuch as and because the act of 1875 does not prohibit conditions, it is entirely competent for the legal voters of the village to impose such conditions upon an issue of bonds voted by them under such act as they may deem best; provided, of course, that they are not in violation of some express provision of the act mentioned, or some other statute, and are not prohibited by any general rule of public policy. This seems to us to be so apparent as to require no argument to support it.

The plaintiff, however, contends that the proposition of the railway company, and the condition of the vote as to the location of the depot at the particular place named, are against public policy, because they introduce, or may introduce, an element or motive into the proceedings through which the issue of bonds is to be brought about, by which the ten freeholders who petition for the meeting, and a majority of the legal voters, may be improperly influenced—that is to say, influenced by considerations of private or personal interest, pecuniary or otherwise; an interest not shared by the village in general, or perhaps hostile to the public interest.

It seems to us that the counsel's criticism of the proposition and vote in this case, and the reasoning by which he attempts to support it, are altogether too refined and elusive to be of any practical value or importance. When a village or town proposes to lend its credit in aid of the construction of a railroad, it is ordinarily a question of considerable importance where the depot shall be placed so as to best subserve

the general interest and convenience of the inhabitants and business of the municipality; but it is not one of those things which can be made the subject of a mathematical demonstration. What is the best place for the depot is matter of opinion. In this respect it stands upon the same footing as the question of the advisability of a proposed issue of bonds. We can conceive of no reason why the opinion of a majority of the electors should not be permitted to determine one question as well as the other, nor why that opinion should not be expressed at the election in the one case as well as in the other. And it would seem to be a very proper and effective way for the voters to express and carry out their opinions and preferences as to the location of the depot, by imposing the adoption of a designated location as a condition of the issue of the bonds. The same kind of objections (as respects the conflict of private and public interest) which are urged by the counsel against a condition in regard to the location of a depot, could be urged with equal force against the simple issue of bonds without any such conditions, in every case, with hardly a conceivable exception.

The construction of a railway into a town or village always and inevitably operates to the peculiar advantage of some, over and above the general advantage, as well as to the peculiar disadvantage of some. Yet considerations of this kind have not prevented the legislature of this and other states, in a vast number of instances, from authorizing municipal subscriptions and bonds in aid of such construction. This settles the question of public policy. It shows that the legislature has not regarded the existence of motives of private and personal advantage, of the kinds mentioned, as furnishing any reason why such subscriptions and bonds should not be authorized and voted. In our opinion the condition as to the location of the depot was a proper condition, and in no way invalidated the petition or the vote. It may be added that there is nothing in this condition which binds the company to refrain from locating such other depots in, or in the

vicinity of, the village as the convenience of the public may require.

3. The plaintiff further contends that the act of 1875 authorized but one election to be held by the village of Caledonia for the purpose of voting bonds in aid of railway construction, and that one election having been held on March 19, 1875, the election of May 23, 1879, was wholly unauthorized and a nullity. We find nothing in the act of 1875 to countenance this position, either expressly or by implication. The provisions of the act are that the villages and towns mentioned, including the village of Caledonia, "are hereby authorized to issue bonds as hereinafter provided, to aid in the construction of any railway," etc., and that *whenever* ten freeholders shall petition the proper authorities of their municipality for a special meeting to vote upon the issue of such bonds, the authorities shall immediately call such meeting, etc., and that if a majority of the votes cast at such meeting is in favor of issuing bonds, the authorities shall proceed to cause them to be issued, etc. Certainly, there is nothing here to prevent the holding of more than one election, or the voting of more than one issue of bonds. On the contrary, so far as the act of 1875 is concerned, the authority of the villages and towns mentioned is, in these respects, unlimited.

4. By an amendment of the constitution of this state, adopted in November, 1872, it is declared that "the legislature shall not authorize any county, township, city, or other municipal corporation, to issue bonds, or to become indebted in any manner, to aid in the construction or equipment of any or all railroads, to any amount that shall exceed ten per centum of the value of the taxable property within such county, township, city, or other municipal corporation; the amount of such taxable property to be ascertained and determined by the last assessment of said property, made for the purpose of state and county taxation, previous to the incurring of such indebtedness." Const. art. 9, § 14b. The amount of taxable property in the village of Caledonia, as shown by the

last assessment before the vote of May 23, 1879, to wit, the assessment of 1878, was \$330,000; hence the plaintiff claims that, as the amount of bonds voted in 1874, to wit, \$12,000, and the amount voted in March, 1875, to wit, \$8,000 additional, and the amount voted in May, 1879, to wit, \$20,000, altogether amounting to \$40,000, exceeds the ten per centum limit, to wit, \$33,000, fixed by the constitution, the last vote, therefore, is void.

No bonds have as yet been issued to the defendant under either of the first two votes. Whether the vote of \$20,000 in 1879 was intended to supersede the previous votes, and whether the act of 1875 supersedes and repeals the act of 1874, are questions not necessary to be determined upon the facts before us in this case. It is enough that, as held in *State v. Town of Lime*, 23 Minn. 521, the votes of 1874 and 1875 were, so far as the facts appearing show, in effect standing offers on the part of the village to the railway company; offers upon the performance of which the company had a right to insist, upon its own compliance with the terms upon which the offers were made. But the company was not obliged to accept the offers. It might accept them and claim their fulfilment, or it might refuse to accept them. And, as in other cases, the refusal might be express, as by a formal resolution of the proper authorities, or it might be implied from some conduct inconsistent with a claim of acceptance, or amounting to a waiver.

Now, whatever may be the *status* of the votes of 1874 and 1875, (independent of the vote of 1879,) as it appears that no bonds have been issued under them, we think the effect of the vote of 1879, and the claim of its benefits by the company, is to waive any right of the company to both of them. The vote of 1879, it is to be remembered, was based upon a formal proposition on the part of the company, the effect of which, when it was accepted by the village, would appear to be to create a complete contract between the village and company, the obligations of which were mutual; and in this

action the company, both upon the allegations of the complaint and its appearance in the action, is claiming the benefit of the vote of 1879. Now, if the *status* of the votes of 1874 and 1875 is such that (irrespective of the vote of 1879) the company would be entitled to claim the amounts voted in 1874 and 1875—to wit, \$12,000 and \$8,000, respectively—then the effect of the vote of 1879, based upon the company's proposition as before mentioned, and the claim of its benefits by the company, is a waiver of any right under one or the other of the votes of 1874 and 1875. That is to say, the company can no longer claim both. By its proposition and claim under the vote of 1879, the company, in effect, says to the village: We ask an issue of bonds to the amount of \$20,000, and as this is inconsistent with a claim of both of the two amounts previously voted, inasmuch as we cannot have all three without a violation of the constitution, we waive our right to one of the first two.

This seems to us to be the correct view of the facts and law of the case, as they are presented in the complaint, and as this disposes of the important points relied upon in support of the complaint, we are of opinion that the complaint failed to state facts entitling the plaintiff to an injunction forbidding the delivery of the bonds issued under the vote of 1879, or their receipt by the company, or the delivery of bonds for one or the other of the amounts voted in 1874 and 1875. But we wish to reiterate that we do not pass upon the *status* of the bonds voted in 1874 and 1875, the facts stated in the complaint not enabling us to do so.

Order reversed.

WILLIAM CHANDLER vs. CHARLES A. DE GRAFF and another.

September 30, 1880.

Conversion—Answer—Denial—Evidence.—The complaint alleges that in the year 1872 the defendants "wrongfully took, carried away, and converted to their own use, a large number of railroad cross-ties, to wit, 26,000 and more ties, the property of plaintiff, and which were lying and being near the line of the Northern Pacific railroad," etc. The answer denied "that in 1872, or at any other time, said firm (the defendants) wrongfully or otherwise took, or carried away, or converted to their own use, a large number of cross-ties, to wit, 26,000, or any other number, the property of said plaintiff, as alleged in the complaint or otherwise." *Held*, this is to be taken as a denial of each of the facts alleged, which is thus mentioned in the answer, including the plaintiff's ownership. Under this denial it was competent for defendants to prove that the ties referred to were got out and delivered on the railroad by plaintiff for them.

Same—Contract to furnish Ties—Confusion of Goods.—Plaintiff and defendants had five contracts for the delivery, by the former to the latter, of different quantities of ties, the aggregate number to be delivered, under all the contracts, being 224,240 ties—some to be delivered on the line of the Northern Pacific railroad, some on the line of the St. Paul & Pacific, and others on the line of either road. The plaintiff delivered on both lines considerably more than all the contracts called for, and as they were from time to time delivered and inspected, and included in the estimates by the railroad companies to defendants, they credited plaintiff with the ties delivered, without reference to any particular contract, except that, the price under one contract being 30 cents per tie, and under all the others 28 cents per tie, the number at each price was specified in the accounts. From time to time defendants made payments to plaintiff, generally on account of ties delivered, without reference to any particular contract. As to the places of delivery the contracts do not appear to have been strictly regarded. There were delivered on the line of the St. Paul & Pacific road about 25,000 less than the contracts required to be delivered there, and on the line of the other road a great many more than the contracts required or permitted to be delivered there. After the delivery of the ties the parties had a settlement, upon which it was found that plaintiff had delivered on both lines 20,359 ties more than all the contracts called for. The defendant then paid him the balance unpaid for 224,240 ties, and gave him an order on their agent, as follows: "APRIL 22, 1872. *Mr. G. N. Pierson*—**DEAR SIR:** There were inspected and accepted 20,359 ties in excess of Mr. Chandler's contracts. You will, therefore, deliver that number to him,

and take such means as may be necessary to reinvest said ties in him. Yours, etc., DE GRAFF & Co." It does not appear that the 20,359 ties last delivered, or any of them, could be distinguished from the others. Soon after, defendants carried away, according to plaintiff's evidence, all, and, according to their evidence, part, of the ties on the line of the Northern Pacific road, but it does not appear that they carried away any of those on the other line, of which there were about 50,000. Held, that it was proper for defendants, upon showing that they left ties on the Northern Pacific line, to show how many, and what became of them—as that they were burned; also that the railroad company had paid defendants' estimates, including all the ties delivered, is immaterial; also that after the settlement, and until the 20,359 ties called for by the order given to plaintiff should be separated from the others, he had not the title to any specific ties; also that the defendants had a right to take out of all those delivered 224,240 as their portion of the ties, if they left for plaintiff enough to meet the order given him; also that they were not bound to leave for him that number of ties of those on the line of the Northern Pacific road; and it not appearing that they carried away any of those on the line of the St. Paul & Pacific, (of which there were many more than enough to satisfy the order given to the plaintiff,) it does not appear that they have done what they had not a right to do.

Appeal by plaintiff from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial.

E. C. Palmer, for appellant.

Gilman & Clough, for respondents.

GILFILLAN, C. J. Many of the questions raised by the plaintiff are practically disposed of by the decision of a matter of pleading. The complaint alleges that in the year 1872 the defendants "wrongfully took, carried away, and converted to their own use a large number of railroad cross-ties, to wit, 26,000 and more ties, the property of said plaintiff, and which were lying and being near the line of the Northern Pacific railroad, between a point thereon ten miles east of Brainerd, Minn., and a point near the crossing of the Crow Wing river of said last-named railroad in said state." The answer denies "that in 1872, or at any other time, said firm (the defendants) wrongfully or otherwise took, or carried away, or converted to their own use, a large number of railroad cross-ties, to wit, 26,000, or any other number, the property of said

plaintiff, as alleged in the complaint or otherwise." Plaintiff claims that this amounts only to a denial of the taking and conversion, and admits all the other facts grouped together under the allegation in the complaint, including his ownership. We think not, and that it is to be taken as intending to deny every one of the facts so alleged, and which is mentioned or referred to in the denial, including the ownership of plaintiff. The plaintiff evidently understood his property in the ties as denied, for at the trial he introduced evidence to prove that he owned the ties which were taken away by defendants. This he did by showing that he got out and placed along the line of the railroad a large number of ties. In order to prove that the ties so placed along the line of the railroad were theirs and not plaintiff's, it was proper for defendants to introduce the contracts between them and plaintiff under which he got out and placed the ties there.

There is nothing in the objection to the witness Morris stating his estimate of the number of ties at Glyndon. He saw them, and had shown himself competent to form an estimate of the number. The tie inspector's book introduced by defendants was barely competent, if competent at all; but, so far as we can get at its contents, its introduction could not have done any harm. So far as it showed the number of ties got out by plaintiff for defendants, it was merely superfluous. The number of those ties was fully shown by other evidence, and does not appear to have been controverted on the trial; and so far as it showed that others than plaintiff had got out for defendants, and delivered at other places, ties not involved in this controversy, it is impossible to see how it could prejudice any one. So, whether the book was competent or not, a new trial ought not to be granted because of its admission.

We think evidence of ties having been burned admissible. Defendants claimed, and offered evidence to show, that when they removed the ties which they were entitled to carry off, they left enough to satisfy the plaintiff's claim. Evidence that, after the defendants took away their ties, there were

others, such as plaintiff claims, left on the ground, and how many, and what became of them, was, in the shape which the case took upon the trial, certainly competent. That defendants had been paid by the railroad company for all the ties which the plaintiff got out for them, did not affect their title to the ties, as was decided between these same parties in 22 Minn. 471. Evidence of that fact could not tend to prove that they removed the ties. Such evidence would have been wholly immaterial, and it was properly excluded. We cannot see that Williams testified, in reference to plaintiff's account, to anything that did not appear from the account itself introduced by plaintiff.

This brings us to the charge of the court. Several contracts for the delivery of ties by the plaintiff to defendants were proved—one to deliver 100,000 on the line of the St. Paul & Pacific railroad, or on the line of the Northern Pacific railroad; one to deliver 60,000 on the line of the St. Paul & Pacific railroad; one to deliver 25,000 on the line of the Northern Pacific railroad; one to deliver 25,000, no place of delivery being shown; and another for 14,240, on the line of the St. Paul & Pacific. The aggregate to be delivered under all the contracts was 224,240 ties. Plaintiff actually delivered for defendants on the lines of the two railroads a large number in excess of that called for by all the contracts. Less were delivered on the line of the St. Paul & Pacific railroad than the contracts required to be delivered there, and more on the line of the Northern Pacific railroad than the contracts required or authorized to be delivered there. Shortly before the taking complained of, the parties appear to have had a settlement in respect to the ties delivered. On this settlement it was found that plaintiff had delivered 20,359 ties more than were called for by all the contracts. The defendants then paid him the balance then unpaid for the 224,240 ties called for by all the contracts, and took his receipt for such payment, and gave him an order upon their agent for the ex-

cess of ties found to have been so delivered, in the following words and figures:

"APRIL 22, 1872.

"*Mr. G. N. Pierson*—DEAR SIR: There were inspected and accepted 20,359 ties in excess of Mr. William Chandler's contracts. You will, therefore, deliver that number to him, and take such means as may be necessary to reinvest said ties in him. Yours, etc.,
DE GRAFF & Co."

So far as the method of keeping the accounts between the parties was shown—and defendants introduced plaintiff's receipt in which the account is stated, and plaintiff introduced a statement of the account from defendants' books of account—it appears that in the account no distinction was made between the several contracts, except that the price of the ties under the contract for 100,000 being 30 cents, and the price under the other contracts being 28 cents, the number of each kind was specified in the accounts. In the accounts 100,000 were credited to plaintiff at 30 cents, the remainder of the whole amount delivered at 28 cents, and in the settlement defendants paid plaintiff for 100,000 at 30 cents, and 124,240 at 28 cents. Payments were made generally from time to time, without regard to any particular contract. Except, then, as to price of the ties, the contracts were treated as though they were all one. There was nothing in the evidence to show that it was possible to distinguish the 20,359 ties last delivered from the others.

The case presented was, therefore, that there were on the lines of the two railroads 244,599 ties, of which 224,240 belonged to the defendants, and 20,359 to plaintiff, his being commingled with and unsevered from those which he had contracted to deliver to defendants. The first, second, and third requests of plaintiff to charge the jury were on the theory that the answer admitted plaintiff's ownership of the ties, and were therefore properly refused. His fourth, fifth, seventh, and eighth requests were based on the assumption that

the excess of ties delivered by plaintiff beyond what his contracts called for, and those which on the settlement the parties agreed should be returned to plaintiff, were among those delivered on the line of the Northern Pacific railroad, and that defendants were bound to leave for plaintiff, of those on that line, enough to satisfy the order given him on the settlement, and if they took away all on that line, they were liable for the excess of ties to which he was entitled.

The charge of the court, both in giving the requests made by defendants, and in its modification of plaintiff's sixth request, was, in substance, that if plaintiff, in delivering ties under his contracts with defendants, commingled with them a quantity in excess of his contracts, he could not claim those last delivered as being the excess; and if defendants took from the common lot, leaving for plaintiff a number equal to the excess, though they might not be those last delivered, they are not liable; that if the ties were so commingled that the excess could not be distinguished from the other ties, either party might take from the common lot the number of ties to which he or they were entitled, and neither would be liable to the other except for taking more than his or their proportion; that after plaintiff's acceptance of the order, on the settlement with the defendants, his right was simply to take from the common lot the number he was entitled to; and until they were so separated from the common lot, defendants could not be liable for taking any of the ties, provided they left as many as belonged to plaintiff; that, even if defendants did take away those to which plaintiff was entitled, if they did so innocently and unknowingly, they would not be liable until plaintiff demanded his ties from them; but if they took the ties knowing that they did not leave enough for the excess belonging to plaintiff, they were liable without a demand.

• We do not think there is any error in the charge in stating the rights of the parties prior to or independent of the settlement, and order given upon it. But it is certain that after the settlement and acceptance of the order plaintiff did not

own any specific ties of all that he had delivered. To give to him title to any specific ties, it was necessary that the ties called for by the order should be separated from the common lot; nor was the common lot from which they were to be taken confined, as plaintiff claims, to those which had been delivered on the line of the Northern Pacific railroad. The settlement was not for those ties alone, but for the aggregate of all the ties delivered, without regard to where they were delivered, or to any particular contract under which they were delivered. In the dealings between the parties, those contracts, so far as they specified places of delivery, do not seem to have been strictly regarded. Thus, two of the contracts required about 75,000 ties to be delivered on the line of the St. Paul & Pacific; the others required or authorized about 150,000 to be delivered on the line of the Northern Pacific; but only about 50,000 were delivered on the first of these lines, and about 195,000 on the last; and yet, without regard to the place of delivery specified in the contracts, or to the place where actually delivered, the defendants in their accounts credited plaintiff with them as fast as delivered, made general payments from time to time on the account, and on settlement paid him the balance for 224,240 ties, the aggregate of all the contracts, without any specification of where the ties thus paid for were, and gave him the order for the 20,359, without specifying from what ties other than the entire lot delivered they should be taken. Had plaintiff desired that the 20,359 ties to be returned him should be taken out of any particular part of all those delivered by him, he should have insisted on it at the time of the settlement. In view of these facts, and under this settlement, defendants might take the 224,240 ties they had paid for from the entire lot delivered, without regard to the place where they were at the time,—whether on one line of railroad or the other,—and if they took no more than their proportion, leaving enough to satisfy plaintiff's order, they did only what they had a right to do, and cannot be liable. This disposes of the case, for it does

not appear, and plaintiff does not claim, that any of the ties, delivered on the line of the St. Paul & Pacific, much more than enough to fill plaintiff's claim, were taken by defendants.

In plaintiff's brief a good deal is said about "culls," by which we understand ties which, on inspection, were rejected, though it is not very clear what is claimed on account of them. It does not appear that on the trial any claim was made on account of "culls," and, if there had been, the evidence is not such as would have justified a verdict for plaintiff on account of them. The newly-discovered evidence, one of the grounds of the motion for a new trial, is merely cumulative.

Order affirmed.

ANN GELLATLY vs. MINNESOTA ODD FELLOWS' MUTUAL BENEFIT SOCIETY.

September 30, 1880.

Life Insurance—By-law as to Proofs of Death.—This is an action upon a life-insurance certificate, issued by the defendant society. One of defendant's by-laws provided that "proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or of the nearest lodge to the deceased." *Held*, that upon defendant's refusal (on proper application) to furnish the blanks mentioned, proper proof of death might be made without such blanks, and in such case the proofs need not bear the lodge seal spoken of.

Evidence *held* sufficient to sustain the findings of the jury.

Appeal by defendant from an order of the district court for Ramsey county, *Wilkin*, J., presiding, refusing a new trial.

E. C. Palmer and *Chas. N. Bell*, for appellant.

James Smith, Jr., and *W. T. Burr*, for respondent.

BERRY, J. The defendant is a mutual life-insurance society. This is an action upon a certificate of membership in

such association, issued to John T. Gellatly, by the terms of which the defendant agrees to pay to the plaintiff, if living, within 60 days after due notice and satisfactory evidence of the death of her husband, the said John, a sum equal to the amount sued for in this action. The certificate also contains a condition that if the said John shall fail to comply in all respects with the by-laws and regulations of the society, the certificate shall be void. John T. Gellatly died September 17, 1877.

1. It was objected upon the trial (which was by jury) that the plaintiff could not recover, because her husband had failed to comply with one of the defendant's by-laws with reference to the payment of an assessment. Whether he had so failed depended upon whether the defendant's secretary had notified him of the death claim which rendered such assessment necessary. For the defendant it was claimed that notice was given (as it properly might be under a by-law) by mail, and the defendant introduced evidence tending to sustain this claim. On the other hand, the plaintiff introduced evidence which, as it seems to us, tended legitimately to show that no such notice was ever mailed or received. Upon this point in the case we are of opinion that the testimony, though conflicting in its effect, was sufficient to support the finding of the jury that no notice was sent.

2. One of the defendant's by-laws provided that "proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or of the nearest lodge to the deceased." It appears that a person acting for Mrs. Gellatly applied to the defendant's secretary for blanks of the kind mentioned in the by-law, and that the secretary refused to let him have them. Presumably, and in the absence of some positive regulation to the contrary—of which we discover no evidence—the secretary would appear to be a proper person to whom to make such application, so that his refusal to furnish would be that of the society; and, in addition, it appears from the testimony of the secre-

tary himself, nowhere contradicted, that he had authority to furnish these blanks, upon receiving what he styles official notice of the death of a member of the association. The notice thus spoken of could not be the "proof of death," for the blanks in question were the blanks upon which that proof was to be made. It must be that any definite notice and knowledge of the death would authorize him to issue the blanks. That he had this notice and knowledge at the time when the blanks were applied for, and before, there is no doubt.

3. If the defendant refused to furnish the blanks—as the evidence shows beyond question—then the plaintiff certainly had a right to make proper proof of death without them, and this seems to have been done. And it was not necessary that such proofs should bear the lodge seal spoken of in the by-law, for it was only the blanks to be furnished by the society upon which such seal was required, and these were refused. As the evidence was in all respects sufficient to sustain the verdict of the jury, these conclusions virtually dispose of the case. Among other things, it follows from them that upon the concurring testimony on both sides as to the refusal to furnish the blanks, the instruction of the court as to the effect of a return of the proofs of death, made without pointing out any objection for want of a lodge seal, was, whether right or wrong, altogether unimportant.

Order affirmed.

TRULS PETERSON *vs.* FIRST DIVISION OF THE ST. PAUL &
PACIFIC RAILROAD COMPANY and others.

October 1, 1880.

Pre-emption—Construction of Statute—Settlement and Occupancy requisite.—Sp. Laws 1862, c. 20, § 8, provides that "all persons, or their assigns or legal representatives, who in good faith settled upon any of the lands hereby granted to the said The Saint Paul & Pacific Railroad Company at or prior to the time when the line of said road and branch was definitely fixed and located, with a view to pre-empt, and who have continued to occupy the same, shall be at liberty to purchase such land at \$2.50 per acre, if within the six-mile limits of the line of said road, and if without such limits \$1.25 per acre." *Held*, that the line definitely fixed and located, here meant, is the company's (so-called) preliminary survey of its line, made in the summer and fall of 1857, and approved by its board of directors November 9, 1857. Also, that the words "at or prior" do not go any further than to include those persons who had settled on the lands at any time before such location of the line, and those who were such settlers at the time of such location. Also, that to have settled on the lands in good faith and with a view to pre-empt, a person must have made an actual genuine and not sham settlement thereon, with the view and intent of obtaining title thereto by complying with the provisions of the pre-emption law of the United States. Also, that upon a consideration of the evidence and findings in this case, the plaintiff was not a settler upon the lands involved in this action, within the meaning of section 8, before cited. Also, that the plaintiff is not shown to have continued to occupy said land as required by said section.

Plaintiff brought this action in the district court for Meeker county to compel the defendant company to convey to him a quarter-section of land described in the complaint, on his paying therefor the sum of \$400. The action was tried by *Brown, J.*, who ordered judgment for defendants. A new trial was refused, and the plaintiff appealed.

Gilman & Clough, for appellant.

Bigelow, Flundrau & Clark, for respondents.

BERRY, J. Sp. Laws 1862, c. 20, § 8, reads as follows: "That all persons, or their assigns, or legal representatives, who in good faith settled upon any of the lands hereby granted to the said The Saint Paul & Pacific Railroad Company, at or

prior to the time when the line of said road and branch was definitely fixed and located, with a view to pre-empt, and who have continued to occupy the same, shall be at liberty to purchase such land at \$2.50 per acre, if within the six-mile limits of the line of said road, and if without such limits, at \$1.25 per acre: *provided*, that application therefor, and proof of the right to purchase, shall be made within six months after the fee of said lands shall be acquired by said company."

We will consider first what is meant by the clause, "at or prior to the time when the line of said road and branch was definitely fixed and located." The tense shows that some fixing and location were referred to which had already taken place when the act of which section 8 is a part was passed, March 10, 1862. The only fixing and location which had been made at that time was the St. Paul & Pacific Railroad Company's so-called preliminary survey of its line, made in the summer and fall of 1857, (and over the particular land involved in this action, on the 15th and 16th days of October, 1857,) and approved by the company's board of directors on November 9th of the same year. A duplicate map of this survey and location, duly certified, was filed in the office of the governor of the then territory of Minnesota, November 12, 1857, and another immediately thereafter in the United States general land-office at Washington. This was the location of the line in accordance with which the congressional land grant to said company, under the act of congress of March 3, 1857, and under the act of the legislature of the territory of Minnesota of May 22, 1857, was adjusted, and the lands granted certified to the state of Minnesota, and by the governor conveyed to the successor in interest of said company, to wit, the defendant company. No other survey or location of the line has ever been made with any view of fixing or determining the limits of said land grant, or with any reference thereto. There has been a resurvey, and to some extent relocation, of the line, for purposes of construction and for engineering reasons. The point of commencement of such

resurvey and location, and its general course and terminus, coincide with the original survey and location. The latter was taken as the basis of the relocation upon which the line of road was actually constructed, and was kept as near to as practicable. In view of these facts, found by the court below, which are amply sustained by the evidence, we have no doubt that the line of preliminary (so-called) survey and location was that which the legislature had in mind in section 8, before quoted. It was not only the only line in existence at the time when that section was passed, but it was and has to this day remained as the line definitely fixed and located, as respected the congressional land grant; and it was with reference to lands embraced in that grant that section 8 and the act of which it is a part were enacted. We have no doubt that the line in question was definitely fixed and located, within the meaning of section 8, as early, at any rate, as the 9th day of November, when the survey and location are found to have been approved by the board of directors of the Minnesota & Pacific Railroad Company.

As to the words "at or prior," they are, perhaps, practically somewhat tautological. They are quite commonly associated in legal documents and legislation. Doubtless they were used for this reason, without any critical consideration of their necessity, and they do not, in our opinion, go any further than to include those persons who had settled on the lands at any time before the location of the company's line, and those who were such settlers at the time of such location.

The next question is, had the plaintiff settled upon the land in controversy before the location of the line, in good faith, with a view to pre-empt?

The evidence to support the plaintiff's claim of settlement is this: He testifies: "I came to this country about August 4, 1857. I went on the land in controversy, and made improvements on it, about August 12th, same year. * * * I selected the land in controversy before August 12, 1857, and commenced work on it about the same time. I cut some

rails, and built a shanty on the land, and also cut some brush there, and dug a well. I also, at the same time, set up some poles and rails, and wrote my name on them, to let people know that I claimed the land. It was my intention to make it my home and make it my land." Although he testifies that he has continued to occupy the land up to the time of the trial, and has never abandoned it, there is nothing to show that he made any further improvements upon it until about March 1, 1858, or ever resided upon it until long thereafter. In February, 1858, he filed in the proper local land-office the declaratory statement required by the pre-emption law, in which he states that he has, "on the second day of January, A. D. 1858, settled and improved" the land in question. Upon his cross-examination, plaintiff testified that he first "saw the land between the seventh and twelfth days of August, 1857. On the 13th of August I cut a wagon load of rails, [on the land, as we conjecture,] and I let them lie there until the next spring. I built a shanty in two or three days after cutting the rails. The shanty was twelve feet square. I put hay and brush on it. I put no door, window, floor, stove or chimney in it. I covered it with brushes and hay. I never put any furniture into that shanty. It took two days to build it; no one helped me. I built it in August, 1857. I also dug a well there about three feet deep, and brushed some around some plum trees. That is all I did there in 1857. * * I never slept there until the spring of 1860. I cut about 1,000 rails on the land in the winter of 1857-8. * * I used the 1,000 rails spoken of in building fence on the land the next spring."

Peter Hanson, a witness called by plaintiff, testified upon cross-examination: "I did not see him (plaintiff) build the shanty, but saw the shanty. * * It had no roof, door, window or floor, except a hay roof. He never lived there all the time in that shanty. I never saw him sleep there in it. I have seen him eat there. He lived at my house and brother Ben's house until * * in November." Ben Hanson, another

of plaintiff's witnesses, testified that "the shanty was not built to live in, but to hold the claim." We discover no other testimony in the case which adds anything to what we have above extracted upon the matter of settlement.

The court below found that the plaintiff had not settled upon the lands within the meaning of section 8. The court also finds—and in this is supported by the testimony—that the plaintiff never resided upon the land until 1860. Does the testimony fairly tend to establish a settlement by the plaintiff in good faith, with a view to pre-empt? The legislature has nowhere defined the settlement mentioned; but at the time when the act in which section 8 is found was passed, the United States pre-emption law was, and for many years had been, extant. We refer to the act of congress of September 4, 1841, (5 U. S. St. at Large, 453,) which provided, in section 10, as follows, viz.: "Every person * * * who shall hereafter make a settlement in person on the public lands, * * * and who shall inhabit and improve the same, and who has, or shall erect, a dwelling-house thereon, shall be and is hereby authorized" to enter a quarter-section of public land. As the settlement spoken of in section 8 is a settlement *with a view to pre-empt*, we think it a fair inference that the legislature had in mind such a settlement as would satisfy the United States pre-emption law. To have settled upon any of the land mentioned in good faith, and with a view to pre-empt, a person must have made an actual, genuine, and not sham, settlement thereon, with the view and intent of obtaining title to the same by complying with the provisions of the pre-emption law of the United States. In other words, to avail himself of section 8, the claimant must not only have had a view to pre-empt, but he must have made a settlement in person upon the land.

The intent and acts evincing a settlement must concur, and as in general, so here, the acts are the best test of the reality and genuineness of a claimed intent. Now, what the evidence fairly tends to establish is nothing more than this:

That the plaintiff went upon the land on August 12, 1857; cut some rails; built a rail pen of them; cut some brush and some hay, and put them upon the pen; and dug a hole three feet deep in the edge of a marsh. The rail pen is called a shanty, or house, and the hole a well. The so-called house never was inhabited, nor inhabitable. It was not a house, but, as one of the witnesses naively remarks, was made, not to live in, but to hold the claim with. It was in no proper sense an improvement; it was a mere sham, as was also the pretended well. Now, so far as we discover, the plaintiff did no other acts upon the premises for which any significance could be claimed prior to November 9th, when the line of location was approved, except these.

It seems to us that the court below was right in holding that these did not constitute a settlement within the meaning of section 8, and that therefore the plaintiff had failed to bring himself within the provisions of that section. The same result may also be reached, we think, by another line of reasoning. A person, to avail himself of section 8, must "have settled upon" lands "with a view to pre-empt," and "have continued to occupy the same." From when? Evidently from the time of making his settlement; and the occupation must have continued at least down to the time of the location of the line of railroad, if not to the time of applying to purchase the land. If the plaintiff had the title to the land in controversy, he would then have been constructively in possession of it. But he not only did not have the general title, but he had none of any kind, nor any interest in the land. If he did not live upon it—and he did not until 1860—or at least cultivate, or crop it, or work upon it in some way, we are unable to see in what sense he could be said to occupy it. Yet, from about the 15th of August, 1857, he does not appear to have done anything upon it prior to the 9th of November, or, in fact, prior to a considerably later date. Even, then, if the acts which he did in August could be held to constitute a settlement and an occupation, it is apparent that

that occupation was not continued as required by section 8. We have no doubt, then, that upon either of the two grounds indicated, the plaintiff fails to bring himself within the benefits of section 8. These views dispose of the case.

Order affirmed.

GEORGE W. HARRINGTON vs. TOWN OF PLAINVIEW and others.

October 6, 1880.

Dismissal of Appeal.—*James v. Cornish*, 25 Minn. 305, followed, that an appeal will not be dismissed where the judgment appealed from adjudges costs against the appellant, on the ground that the questions in controversy have, since the appeal, become mere abstract questions as between the parties.

Injunction to restrain Issue of Town Bonds.—Where a statute provides two modes, one valid and the other invalid, for authorizing the officers of a municipal corporation to issue bonds of the corporation, inasmuch as the bonds when issued need recite only that they were issued under the statute, without specifying in which of the two modes the officers were authorized to issue them, and as there might be *bona-fide* holders of bonds so issued, an action for injunction at the instance of a proper party will lie to restrain the issuance of the bonds by the municipal officers, under the invalid mode provided by the statute.

Towns—Electors alone can take Action requiring Local Taxation.—Under the constitution it is not competent for the legislature to authorize any person or class of persons, other than the electors or the officers chosen by the electors of a town, to determine what action requiring local taxation the town will take in any particular case. Therefore, Laws 1877, c. 106, § 7, which assumed to empower a majority of the resident taxpayers, without regard to whether they were electors or not, to bind a town to issue its bonds to aid in the construction of any railroad, was unconstitutional and void.

The plaintiff, a resident and tax-payer in the town of Plainview, in Wabasha county, brought this action in the district court for that county to restrain the town officers from issuing the bonds of the town to the Plainview Railroad Company, to aid in the construction of its railway. The action was

37	224
42	306
37	224
58	226
27	224
65	408

tried by *Mitchell, J.*, and judgment was ordered and entered for the defendants, and the plaintiff appealed.

Taylor & Sperry, for appellant.

Wilson & Gale, for respondents.

It is certainly competent for the legislature to authorize the issuance of bonds by towns in aid of railways, and taxation for their payment. *Davidson v. Com'rs of Ramsey County*, 18 Minn. 482. And where the legislature may authorize, it may direct or order; for the town being the mere agent of the state, and having no power whatever itself in the premises, except to perform the functions for which it is created, its assent or dissent cannot affect the validity of the act which it is delegated to do. *Town of Duaneburgh v. Jenkins*, 57 N. Y. 177; *Town of Bennington v. Park*, 50 Vt. 178; *Guilder v. Town of Otsego*, 20 Minn. 74; *Guilder v. Town of Dayton*, 22 Minn. 366. The last two cases relate to the power of the legislature to order the construction of ordinary highways, and that the towns within which they are or which are to be benefited by them should pay therefor; and the principle is the same in the case of railways, for they are merely improved public highways. *Davidson v. Com'rs of Ramsey County*, 18 Minn. 482; *Thompson v. Lee County*, 3 Wall. 327; *Railroad Company v. Otoe County*, 16 Wall. 667; *Olcott v. Supervisors*, 16 Wall. 678.

But even if the approval of the town was a condition on which alone the legislature has the right to authorize or direct the issuance of the bonds, that approval has been given in this case. How that consent shall be given—whether by vote of the electors, or by petition of a majority of the resident tax-payers—is clearly in the discretion of the legislature. *Town of Duaneburgh v. Jenkins*, 57 N. Y. 177; *Town of Bennington v. Park*, 50 Vt. 178; *First Nat. Bank v. Town of Concord*, 50 Vt. 257; *People v. Batchelder*, 53 N. Y. 128; *Horton v. Thompson*, 71 N. Y. 513; *People v. Mitchell*, 35 N. Y. 551; *Williams v. Town of Duaneburgh*, 66 N. Y. 129.

GILFILLAN, C. J. In this case the respondent moved to

dismiss the appeal on the ground that, since the entry of the judgment appealed from, the bonds to enjoin the issuance of which the action was brought have been issued, and that, therefore, the question whether the defendants ought to issue them is a mere abstract question. This would be so, were it not that the judgment is also for costs against the plaintiff. As held by this court in *James v. Cornish*, 25 Minn. 305, the appellant has the right to have the judgment examined to determine whether it was correct, so as to entitle defendants to costs. The motion to dismiss is therefore denied.

The point is also made that it is not a proper case for injunction, because, if the statute is unconstitutional and gives no authority to issue the bonds, their invalidity will appear on their face, and there will always be a legal defence to them in whosoever hands they may come. If, by recital of the act under which they issue, their invalidity must appear on their face, so that there could be no *bona-fide* holder of them, an injunction will not lie to restrain their issuance. *Township of East Oakland v. Skinner*, 94 U. S. 255. But if the act be valid, a mere recital in the bond that it was issued under and pursuant to such act, without any further recital, is sufficient, so that a *bona-fide* holder will be protected, although there may have been a defect in the proceedings under the act to authorize the officers to issue the bonds. *Humboldt Township v. Long*, 92 U. S. 642. If the act in question here were wholly void, and no valid bonds could be issued under it, the case would fall within the former of these decisions. But the act provides two modes for authorizing the issue of bonds, one of which is conceded to be valid, and the other only is claimed to be invalid. We do not think the bond need recite under which of these provisions of the act it is issued. It is enough to refer to the act generally, and a purchaser would have the right to presume that it was issued under the valid provisions of the act. There might, therefore, be *bona-fide* purchasers of the bonds. It is a proper case for injunction.

Laws 1877, c. 106, provides:

"Section 1. Any county, town, incorporated city or incorporated village in this state, is hereby authorized and empowered, in the manner herein provided, to aid in the construction of any railroad in this state, to be constructed by any railroad company for public use, by authority of any law of the state, in the manner hereinafter provided, and which will promote the general prosperity and welfare of the tax-payers of such municipality; and the mutual agreement hereinafter referred to, when the same shall be arrived at, shall be conclusive evidence that such railroad will so promote the general prosperity and welfare of the tax-payers of such municipality. * * *" (Gen. St. 1878, c. 34, § 92.)

"Sec. 2. The aid to be contributed to the construction of any such railroad by any such county, town, city or village, shall be by the bonds of such municipality, to be issued to or for the use of such railroad company. * * *" (*Id.* § 93.)

"Sec. 3. No such bonds shall be issued to or for the use of any such railroad company, and no such stock shall be issued to any such municipality, until a mutual agreement in relation thereto shall have been arrived at in the mode hereinafter specified; and when such mutual agreement shall have been arrived at, (in either one of such modes,) the proper officers of such municipality shall be authorized and required to issue and deliver such bonds in conformity with the mode so agreed upon," etc. (*Id.* § 94.)

Section 4 provides that a railroad company, seeking such aid, shall make and deliver to the county auditor, town clerk, or city or village clerk, its proposition in writing for the issuance to it of the municipal bonds. (*Id.* § 95.)

Section 5 provides a mode for arriving at the "mutual agreement" mentioned in the preceding sections, which is by means of an election by the legal voters of the county, town, city or village, as the case may be, notice of which is to be given, in a mode prescribed, by the county auditor, or town,

city or village clerk, upon receiving the proposition, in which such voters vote for or against such proposition; and only in case a majority vote for it, is it to be deemed accepted.

Section 7 provides another mode of arriving at such "mutual agreement," as follows: "*First.* Within three months after the filing of any such proposition as is specified in the fourth section of this act, with any county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given, as prescribed in the fifth section of this act, in three public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five days after its date, a petition to the proper authorities of said county, town, city or village will be presented to the resident tax-payers of such county, town, city or village for their signatures, asking such authorities to agree to such proposition; and such petition shall be appended to a substantial copy of such proposition. *Second.* If, within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed, with such petition to the proper authorities of such county, town, city or village, asking such authorities to agree to such proposition, appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city or village, who were assessed for taxes upon real or personal estate in such county, town, city or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality, and of stock by such railroad company, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and

stock shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act." (Gen. St. 1878, c. 34, § 98.)

The Plainview Railroad Company proceeded, for the purpose of procuring the bonds of the town of Plainview, under section 7. Having filed its proposition with the town clerk, it caused notice to be given that a petition to the town authorities, asking them to agree to such proposition, would be presented for signature to the resident tax-payers of the town; and, within the time prescribed, filed with the town clerk a copy of the proposition, with the petition appended, bearing the signatures, properly verified, of a majority of the resident tax-payers of the town. To enjoin the issuance of the town bonds to the railroad company under these proceedings this action is brought. The court below dismissed the action on the merits.

The case necessarily involves the consideration of the validity of section 7 of the act cited. The proposition was made, and very largely discussed, both in the oral arguments and in the briefs, that it is competent for the legislature to impose on a municipal corporation—a city, county or town—the burden of constructing, or contributing to the expense of constructing, a railroad to be owned and operated for public uses by a private corporation. It is unnecessary to express any opinion on this. The legislature has not assumed to impose such burden on the town of Plainview. It has not determined that it ought to, nor enacted that it shall, issue these bonds, nor passed in any way on the necessity or expediency of the town issuing them, nor on the question that the public interests of the town will be to any extent subserved by the construction of this road. Nor does the act authorize either the electors of the town nor the town officers to determine that question. The petition, it is true, is addressed to the municipal authorities, but they have no power given them to accept or reject it. When the petition is signed by a majority of the resident tax-payers, the proper town offi-

cers are authorized and required to issue the bonds, and no discretion is left them in the matter. What the section assumes to do is to empower the majority of a certain class of residents within the county, town, city or village, to determine, whether assented to or not by the electors or the proper officers, what action the municipal corporation ought to and shall take in aiding a railroad company to construct its road, whenever such company may seek such municipal aid; to govern, direct, and control the action of the municipal corporation in such cases; to determine that the local public interests require that a corporate debt shall be incurred, involving the necessity of local taxation to pay it.

It must be evident that if the legislature may vest the resident tax-payers with power to govern the corporate action in cases of this kind, it may in any and all other cases; may give to them the entire governing power over such corporations; and if it may vest the government in this class of persons, or in any other class than that indicated by the constitution, there is no limitation or control over the legislature in its selection of the class which shall govern. It may give the power to tax-payers of a certain age; or to male tax-payers; or to payers of taxes on real estate; or to payers of taxes on personal property; or, indeed, to any other class of persons. Conceding such power in the legislature, it is difficult to see why, instead of indicating the persons to govern municipal corporations by indicating the class to which they shall belong, it may not indicate them by name. It is very different from the power of the legislature to entrust the performance of a ministerial act on behalf of the corporation to a particular officer, or to a person named specially for the purpose, or to distribute the functions of such corporations between the electors at large and the officers elected by them, or among the officers so elected.

The question really in the case, then, involves the power of the legislature to commit the government of towns, in whole or in part, to others than the electors of such towns or the

officers elected by them. The provisions of the state constitution in reference to towns are very brief. Article 11, § 3, reads: "Laws may be passed providing for the organization, for municipal and other town purposes, of any congressional or fractional townships in the several counties in the state: *provided*, that when a township is divided by county lines, or does not contain one hundred inhabitants, it may be attached to one or more adjoining townships or parts of townships for the purposes aforesaid." Section 4: "Provision shall be made by law for the election of such county or township officers as may be necessary." Section 5: "Any county and township organization shall have such powers of local taxation as may be prescribed by law." Article 7, § 1: "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the United States one year, and in this state for four months next preceding any election, shall be entitled to vote at such election, in the election district of which he shall at the time have been for ten days a resident, for all officers that now are, or hereafter may be, elective by the people." Then follows a specification of the classes of persons from whom the electors are taken. Section 6: "All elections shall be by ballot, except for such town officers as may be directed by law to be otherwise chosen." To give the legislature power to enable women to vote for officers of schools, or upon any measure relating to schools, an amendment to the constitution was adopted in 1875. (Const. art. 7, § 8.) Except in this particular the legislature cannot enlarge or restrict the elective franchise.

From these clauses in the constitution it is apparent that it was intended the legislature should provide for the organization of towns, with powers of local self-government, including the power of local taxation; that the officers of such organizations should be elected by ballot or otherwise, as the legislature may prescribe, but they should be elected by the electors whose qualifications are defined in the constitution; that

the powers entrusted to such organizations should be prescribed by the legislature, and might include such, in respect to local matters, as are in their nature legislative; and that the legislature should prescribe what officers they shall have, and their respective powers and duties.

Though the language of the constitution is permissive in form, it was undoubtedly intended to make it the duty of the legislature to provide for such organizations. The decentralizing of governmental power, and vesting it, when pertaining to merely local objects and purposes, in local organizations, so as to be exercised by those who alone are interested in and affected by its exercise, is what distinguishes American republican government from those republican governments which have been established elsewhere; and it is to be assumed that every American state constitution, unless it necessarily excludes such idea, intends to preserve this feature of American policy. So far as the constitution of this state is concerned, providing for local political corporations or *quasi* corporations, as cities, counties, towns, etc., is the only instance in which, or purpose for which, the legislature may delegate legislative power. It may delegate to each of such organizations the legislative power as to local matters deemed necessary to its well-being; but no one could claim that the power to legislate over any of these organizations could be delegated to any but the organization itself. Section 5, art. 11, says: "Any county and township organization shall have such powers of local taxation as may be prescribed by law." The legislature may prescribe how such delegated legislative power shall be exercised by the officers chosen by the electors, or by the body of the electors. These alone are recognized in the constitution as entitled to exercise political power. Mere residents or mere tax-payers, as such, are not regarded as qualified to exercise such power. For that purpose they must be electors, or officers provided by law chosen by the electors. The corporation acts as a body politic, directly or indirectly, through those in whom political power is vested

by the constitution; and the legislature cannot provide for any others expressing the will of the corporation.

In this our constitution, as we construe it, differs from those of New York and Vermont, as construed by the courts of those states, and in which states legislative acts, similar to that we are considering, have been sustained. Thus, in *Town of Duaneburgh v. Jenkins*, 57 N. Y. 177, the court lay down the rule: "How the consent of a town shall be given is clearly in the discretion of the legislature." "The measure of consent on the part of the town and its tax-payers or electors was fixable at the will of the legislature originally." And in *Town of Bennington v. Park*, 50 Vt. 178, the court said: "The legislature has the undoubted right to prescribe the mode of voting by towns, school-districts, and other municipal organizations, and has always exercised the right. It may rightfully provide that the action of the municipality shall be contingent upon a majority vote, a two-thirds vote, or the unanimous vote of the inhabitants; and it may require the majority vote to include male tax-payers or female tax-payers, and to include or exclude such persons as its wisdom may determine." Thus construing their constitutions, it followed, necessarily, that the legislature might provide for the tax-payers, whether electors or not, expressing the consent and determining the action of the town. But, under our constitution, the action of the town must be determined by the legislature itself, or by those whom the constitution indicates for such purpose, to wit, the electors, or the lawful officers elected by them and authorized so to act. It follows that it is not competent for the legislature to authorize any person or class of persons, other than the electors or the officers chosen by the electors, to determine for a town what action requiring local taxation it will take in a particular case, and that section 7 of the act under consideration is invalid, and any bonds issued pursuant to it void.

Judgment reversed, and cause remanded for judgment pursuant to this opinion.

EDMUND W. HALL vs. ORIN F. SOUTHWICK.

October 6, 1880.

Action brought without Authority—Defendant's Remedy.—The objection that an action was commenced and prosecuted without authority of the plaintiff is not matter of defence, and cannot be made by answer. A motion is the proper remedy.

Mortgage—Assignment—Satisfaction.—K., an owner of real estate, executed a mortgage on it to S., and then conveyed to a third person. The character of the conveyance does not appear, nor does it appear that it created a duty on the part of K. towards his grantee to pay the mortgage before it became due. Before it became due, K. paid some money to S.—how much does not appear—and thereupon S., at K.'s request, assigned the mortgage to A., who, before it became due, assigned it at K.'s request to defendant, upon an adequate and valuable consideration, A. having no actual interest in either assignment, but acting only as the instrument of K. Defendant did not know how the assignment to A. came to be made. *Held*, this does not establish a satisfaction of the mortgage, and it still subsists as a lien on the land.

Action to determine defendant's claim of a lien on certain real estate in Freeborn county. The defendant in his answer alleged himself to be the owner of a valid and subsisting mortgage on the premises, made December 24, 1870, by one Kenyon, the then owner of the premises, to one Street, and on June 17, 1870, assigned by Street to one Anderson, and on July 21, 1870, assigned by Anderson to defendant, such mortgage and each of the assignments being for a valuable consideration, and duly recorded. The plaintiff in his reply alleged that the mortgage had been fully paid. The action was tried by *Page, J.*, who found the facts to be as stated in the opinion, and ordered judgment for defendant, which was entered, and the plaintiff appealed.

Tyrer & Whytock, for appellant.

John A. Lovely, for respondent.

GILFILLAN, C. J. That this action was commenced and prosecuted without authority of the plaintiff was not matter of defence, and such objection could not be made by answer. If true, defendant's remedy was by motion. On

the merits, the only issue is as to the payment and satisfaction of the mortgage executed by Kenyon to Street. The court below does not find as a fact that it was paid. The transaction, as shown in the evidence, which is claimed to establish the payment, was not such as to require us to hold that it proves the fact, and that the court below ought to have so found. The transaction on its face appears not to have been intended as a payment, but to procure an assignment. It took place after Kenyon, the mortgagor, had conveyed the land. He paid Street, the mortgagee, some money—how much does not appear—and thereupon the latter, at Kenyon's request, assigned the mortgage to Anderson, and afterwards Anderson, at Kenyon's request, assigned it to defendant. All this was before the mortgage became due. And defendant, without knowing the circumstances under which the assignment was made to Anderson, took the assignment from him, paying a valid and adequate consideration therefor. Anderson appears not to have had any actual interest in either the assignment to him or his assignment to defendant. He appears to have been merely an instrument of Kenyon to hold and pass the title to the mortgage. Defendant had no dealing with him for the assignment; the negotiation for it was with Kenyon alone, and the consideration was paid to him, being part in cash and part in a debt he owed defendant.

At law there would be little difficulty in the case. The mortgage would continue, the title to it vesting first in Anderson and then in defendant. Equity, however, will sometimes give to the acts and transactions of parties a force and effect different from what they actually intended. In this transaction the actual intention was not to pay and satisfy the mortgage, but to substitute another holder in the place of the original mortgagee, and to keep it alive. If what was intended would operate as a fraud on any person, equity might, in favor of such person, in order to defeat the fraud, give an effect to the transaction different from what was

actually intended. If it would be inconsistent with a duty owing by Kenyon to any person, it might, if possible, give it an effect consistent with such duty. The intention not to satisfy the mortgage at that time, but to change the holder of it, could not operate as a fraud on Sherwood, the then owner of the land, for it could not place him in a worse position than he was in before. It was immaterial to him who held the mortgage. The character of the conveyance by Kenyon to him does not appear, and the relations which it created between them in respect to the mortgage do not appear. It is not to be assumed that it made it the duty of Kenyon to satisfy the mortgage before it became due. Without such duty we do not see how Sherwood or plaintiff, who derives title from him, can claim that the transaction between Kenyon and Street should have the effect to satisfy the mortgage contrary to what was intended. The transaction does not establish the fact of payment.

The judgment of the court below is therefore affirmed.

FREDERICK J. HOFFMAN vs. WILLIAM J. PARSONS.

October 6, 1880.

Municipal Court of St. Paul.—The title of Laws 1874, c. 67, sufficiently expresses the subject of such chapter.

Ramsey County—Justices of Peace—Unlawful Detainer.—A justice of the peace of a town in Ramsey county may properly, within his own town, issue a summons and entertain proceedings in forcible entry and detainer, though the parties to the proceedings reside in St. Paul, and the premises which are the subject of the proceedings are within the limits of such city.

Same—Appeals.—Appeals to the district court, in forcible entry and detainer proceedings, in the county of Ramsey, may properly be brought to trial at the special terms held every Saturday, under and in pursuance of the order of said court, made on March 11, 1876, and subsequently filed and entered *nunc pro tunc* as of that date under said court's direction.

27	236
58	433
27	236
74	431
27	236
85	174

Proceeding before a justice of the peace in the town of Rose, in Ramsey county, under Gen. St. 1878, c. 84, to dispossess the defendant of certain premises in the city of St. Paul, in that county, into which the defendant had entered under a lease from plaintiff, and which he refused to surrender on the expiration of the lease. The defendant, appearing specially, moved to dismiss the proceeding for want of jurisdiction in the justice of proceedings for unlawful detainer of premises within the city of St. Paul, the defendant alleging that the municipal court of that city alone had jurisdiction in such cases. The motion was denied. The defendant answered, renewing therein his objection to the jurisdiction, and a trial was had and judgment was rendered for plaintiff. The defendant appealed, on questions of law and fact, to the district court for Ramsey county. The plaintiff thereupon served notice of trial for a special term of the court, and the cause was placed on the calendar of such special term. The defendant moved to strike the cause from the calendar on the ground that the appeal, being on questions of law and fact, could not be brought on for trial at a special term, which motion was denied by *Simons, J.*, and the defendant excepted. The cause being called for trial by *Brill, J.*, at an ensuing special term on December 6, 1879, (to which it had been continued,) the defendant moved the court that the cause be stricken from the calendar, and be not now tried, on the same grounds stated in his former motion, and on the additional ground that no special term of the court had ever been appointed by the court or a judge thereof, and that the cause had not been noticed for trial at any special term. The motion was taken under advisement, and the cause continued until December 13th, and in the interval the proceedings were had which are set forth in the opinion. On December 13th, the motion was overruled, the defendant excepting, and the cause tried and judgment ordered and entered for plaintiff, from which the defendant appeals.

James B. Beals, for appellant.

H. J. Horn and E. Webb, for respondent.

BERRY, J. 1. Laws 1874, c. 67, is entitled "An act to amend chapter 84 of the General Statutes, relating to forcible entries and unlawful detainers." The chapter thus entitled is in effect an amendment of chapter 84, as respects Ramsey county. Though the title is not as specific as would have been desirable, it expresses, in a general way, the subject of the chapter, and this is sufficient. *State v. Kinsella*, 14 Minn. 524.

2. Under Gen. St. 1878, c. 84, any justice of the peace may, within his county, entertain proceedings in forcible entry and detainer. As respects justices of the city of St. Paul an exception to this general rule is made by Gen. St. 1878, c. 64, §§ 105, 108; but as respects justices of towns in Ramsey county, outside of St. Paul, the jurisdiction given them by chapter 84, to issue summons, and, generally, to entertain proceedings in forcible entry and detainer, outside of said city, remains unimpaired. If they ever had any authority to issue such summons, or entertain such proceedings, *within* the city, that authority appears to be taken away, and conferred upon the municipal court of St. Paul exclusively, by Gen. St. 1878, c. 64, § 104. It follows that it is competent for a justice of the peace of a town in Ramsey county, within his own town, to issue a summons and entertain proceedings in forcible entry and detainer, though the parties to the proceedings reside in St. Paul, and the premises which are the subject of the proceedings are within the limits of such city.

3. Laws 1874, c. 67, before cited, provides that in all cases of appeal under chapter 84 of the General Statutes, relating to forcible entries and detainers in the county of Ramsey, the action may be brought to trial in the appellate court by either party, at any special or general term of said court, by giving to the other party three days' notice in writing of such trial. Gen. St. 1878, c. 66, § 244, provides that "judges of the several district courts may, by order, appoint such special terms

* * * as may be deemed necessary or convenient," but further provides that issues of fact cannot be forced to trial at these special terms. This section, as it stands in the General Statutes of 1878, was enacted in 1868. As respects appeals to the district court, in forcible entry and detainer proceedings, the effect of Laws 1874, c. 67, is to authorize a trial at any such special term, notwithstanding it may require the examination and determination of issues of fact. And by the second section of the chapter, provision is made in such cases for the issue, if necessary, of a special *venire* to bring in a jury. The purpose evidently was to afford that speedy relief which seems to be necessary in proceedings of this character.

The court of common pleas of Ramsey county was merged in the district court on March 7, 1876. On March 11th following, at the special term held on that day, in pursuance of a standing order, duly made and entered, "it was" (as the record here shows) "ordered, and the order announced by the court, that special terms of said district court for the hearing and determination of all matters before the court or judge, except the trial of issues of fact, would be held every Saturday thereafter, though said order was not entered or filed. Pursuant to said order, upon every Saturday since that time, a session of the court has been held, denominated a special term, at which business of the character indicated has been transacted. Since defendant's objection to the trial of this cause at this time was made, the order last referred to has been filed and entered under direction of this court *nunc pro tunc*." The preamble of the order recites the fact that the order was made and announced on March 11, 1876, as before stated, and that no entry thereof was made by the clerk on the minutes, and that it is desirable that a record of the appointment be made. The order is then put in form, and directed to be filed as of March 11, 1876, and an entry thereof made in the minutes of that date. It was filed and entered accordingly.

There can be no doubt of the authority of the district court

to make the order of March 11, 1876, under Gen. St. 1878, c. 66, § 244. It was in fact made and announced, but, as it would seem, by inadvertence, was not filed or entered on the minutes, as it properly should have been. It had, however, become the law (so to speak) of the court, universally understood and acted upon by the court and bar for between three and four years. In such circumstances we think there can be no question that the order was valid, and that the action of the district court in directing it to be filed and entered *nunc pro tunc* was entirely proper, and the order, when filed and entered, as effectual to all intents and purposes as if it had been filed and entered on the day when it was originally made. A special term held under the order was a special term within the meaning of Laws 1874, c. 67, before cited, and therefore appeals in forcible entry and detainer proceedings could properly be brought on for trial then, although issues of fact were to be tried. These are all the points made by defendant which appear to us to require special mention.

Order affirmed.

DANIEL JONES *vs.* AUGUST RADATZ and another.

October 7, 1880.

27	240
54	188

Note with Stipulation for Attorney's Fees.—A note negotiable in form, but which stipulates for payment of reasonable attorney's fees, if suit be instituted for its collection, is not a negotiable note, so as to pass to a purchaser before maturity and without notice, free from defences by the maker.

Appeal by plaintiff from a judgment of the municipal court of St. Paul.

Edmund R. Hollinshead, for appellant.

J. Mainzer and *C. A. Congdon*, for respondent.

GILFILLAN, C. J. The plaintiff, claiming to be a *bona fide* holder, brings suit on an instrument in the following form:

"\$135. P. O. ST. PAUL, COUNTY OF RAMSEY,
STATE OF MINNESOTA, September 7, 1878. }

"Three months after date, we, or either of us, promise to pay to H. K. White & Co., or bearer, \$135, payable at the Second National Bank of St. Paul, Minnesota, for value received, with 12 per cent. interest per annum, from date, and reasonable attorney's fees, if suit be instituted for the collection of this note." [Signed.]

The defendants allege that their execution of the instrument was procured through fraud. The evidence was such as to justify the jury in finding that it was so procured. The admissibility of this defence as against plaintiff, a purchaser before maturity, for value, and without notice, is the question before us; that is, is the instrument a negotiable promissory note? It is so unless by reason of the stipulation to pay reasonable attorney's fees in case of suit brought. The decisions have permitted considerable departure from the original simplicity of commercial paper. Stipulations collateral to the obligation, such as relating to security, or to the remedy to enforce the obligation, have been held not to affect the negotiable character of the instrument. But we know of no case which concedes that the fixed character of the obligation may be changed, either by making it uncertain as to amount, or time of payment, or person by whom or to whom payable, or by making it depend to any extent on a contingency, without depriving the instrument of the negotiability. Certainty in these respects is essential to negotiability.

The instrument before us has this certainty as to the \$135 and the interest. But the whole instrument must be taken together. The promise to pay the \$135 and interest is not the whole of the promise—not the entire obligation created. The entire promise and obligation is to pay absolutely that sum and interest, and in a particular contingency—to wit, the

bringing suit by the payee after default—to pay a further amount not fixed, and not capable of being ascertained from the instrument itself. The suggestion in some of the cases (*Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kans. 433) that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, is not sound; for the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency. Those cases, and *Gaar v. Louisville Banking Co.*, 11 Bush, (Ky.) 180, appear to advance the proposition that an instrument may be negotiable if the amount with which it may be discharged at maturity be fixed and certain, even though the amount required to discharge it after it has passed maturity, or recoverable upon it in an action, be entirely indefinite and uncertain. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which, before that time, removes such certainty, prevents the instrument being negotiable at all. The stipulation in this instrument for payment of reasonable attorney's fees introduced into the obligation an element of uncertainty, which prevented the instrument being a negotiable note. It was, therefore, after its transfer to plaintiff, still subject to all defences which the maker had as against the original payee.

Judgment affirmed.

JACOB ESTELLE vs. VILLAGE OF LAKE CRYSTAL.

October 7, 1880.

Municipal Corporation—Unsafe Platform in Street—If a municipal corporation knowingly permits, in a public street, a structure such as a platform to be used by the public as a part of the street, placed there by a private person, to remain and to be so used, it is its duty to see that it is in safe condition to be used by the public as a part of the street. And this is so, though the structure be not in the most usually travelled portion of the street.

Same—Knowledge, by Person injured, of unsafe condition of Platform.—Previous knowledge of the unsafe condition for use of such a structure, from its not being provided with railings or guards to prevent persons walking or falling off, on the part of one injured in consequence of such unsafe condition, does not conclusively show negligence on his part, but is evidence of negligence to be considered by the jury with the other circumstances of the case.

Appeal by defendant from an order of the district court for Blue Earth county, *Dickinson, J.*, presiding, refusing a new trial.

Loren Cray, for appellant.

Brown & Wiswell, for respondent.

GILFILLAN, C. J. The defendant is an incorporated village, possessing the powers in respect to streets and sidewalks usually vested in municipal corporations. Humphrey street, one of the principal streets of the village, runs east and west, and is 60 feet wide. At one place, for a considerable distance, there is a depression of several feet in the original surface of the ground over which the street runs. Through this depression and along the south side of the street, the village authorities had, by filling in, raised the surface and constructed a wagon road 20 or 25 feet in width, and on the same side had made a sidewalk. Along this made road and sidewalk the travel at that part of the street mostly passed. Nothing had been done by the authorities to improve the north half of the street through this depression. In this depression on the north side of the street, a Mr. Humphrey, in the spring of 1878, erected a store; the front, 20 feet wide, being on the

27	243
48	206
27	243
54	98
54	403
27	243
86	128

line of the street. The first floor above the basement was five or six feet higher than the natural surface of the ground at that place. Along this front, and for four or five feet beyond it on the east, and nearly at the height of the first floor, he constructed a platform about five feet wide, supported by posts. From the projection of the platform beyond the front of the store on the east, there were steps descending north, on the east side of the store, for the purpose of passing from the platform to the basement. No means were provided for getting on or off at the ends of the platform, nor to prevent persons walking or falling off at the ends. For access to the platform from the street he filled the street in front out to the wagon road made by the authorities. It does not appear that the platform was used by any persons except those about the store or basement, or persons dealing or visiting there. It could not be used for the purpose of passing along the side of the street. It was an effectual barrier to such passage on that side. The platform was in the street sufficiently long before the injury complained of to charge the village with notice of it.

In the fall of 1878, in the evening, plaintiff was at the store on business, and upon coming out walked or fell off the end of the platform, injuring himself seriously. To recover for this injury he brings suit against the village. The court is of opinion that a municipal corporation which knowingly permits a structure to be made or to remain in a public street, is liable to one who, without his fault, and while in the proper use of the street, sustains injury from the presence of such structure in the street; that if the structure be of itself a nuisance, dangerous to those using the street, it is the duty of the corporation, having notice, to remove it; (*Cleveland v. City of St. Paul*, 18 Minn. 279;) that if it be not in and of itself a nuisance, but is placed in the street to be used by the public as a part of it, it is the duty of the corporation permitting it to remain, and to be so used, to see that it is in safe condition for the public to use it as a part of the street; and

that this is so, though the structure be not in the most usually travelled portion of the street. The charge of the court below and its refusal of defendant's requests were fairly in accordance with the propositions we have thus stated.

That the plaintiff knew before the injury the unsafe condition of the platform, was evidence of negligence on his part in not avoiding injury from such condition, but did not conclusively establish it. Upon that fact, and the other circumstances of the case, it was for the jury to determine if the plaintiff was negligent.

Order affirmed.

JESSE AMES and others vs. CANNON RIVER MANUFACTURING COMPANY.

October 8, 1880.

Riparian Owner—Right to set back the Water upon an upper Proprietor.—A riparian owner has no right to maintain a dam at such height as to raise and set the water back upon an upper proprietor at the ordinary stage of water in the stream—construing the term ordinary stage to include its stage in such rises, or high water, as are usual, ordinary, and reasonably to be anticipated, but not to include its stage in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year.

Same—Judgment directing cutting down of Dam.—In an action by an upper proprietor on a stream to abate the dam of a lower proprietor, claimed to be so high as to set the water back on the upper proprietor, the court may direct in its judgment that the dam be cut down a specified amount, being the amount required to relieve plaintiff's land, from its height at the time of the trial, though the judgment does not specify that height. Where, in such action, the judgment directs the dam to be cut down, it may direct the sheriff to do it.

Charge—Expression of Opinion on Facts.—It is not error for a trial court, in its charge to the jury, to express its opinion on a question of fact. If a party fears undue influence on the jury of the court's opinion, he may request it to charge that the jury is exclusive judge of the fact.

Appeal by defendant from a judgment of the district court for Rice county, *Lord, J.*, presiding.

27	245
63	529

Batchelder & Buckham, for appellant.

Gordon E. Cole, for respondents.

GILFILLAN, C. J. Plaintiffs and defendant are upper and lower proprietors of the Cannon river, a non-navigable stream, and of the land on each side—the plaintiffs owning above, and the defendant immediately below, and each having a mill and mill-dam. Plaintiffs complain that defendant erected and has maintained and maintains its dam at a height which sets the water back, and raises it above its natural level on their premises, so as to obstruct their wheels, and demand damages, and that defendant's dam be reduced, taken down and abated, so as to relieve their land from the back water. The answer denies the allegation of the complaint. At the trial, apparently without objection, certain issues were framed in the form of interrogatories, and submitted to a jury, who returned a verdict upon them. The interrogatories and the answers of the jury were: "Does defendant's dam cause the water to rise above its natural level at plaintiffs' mill. *Answer.* Yes." "If so, how much? *Ans.* One and one-quarter inches." "How much should defendant's dam be lowered, to lower the water at plaintiffs' mill to its natural level? *Ans.* Three and three-fourths inches." "In what sum have the plaintiffs been damaged by defendant's dam setting the water back upon plaintiffs' mill? *Ans.* Five hundred and thirty and sixty-six one-hundredths dollars."

Upon all the other issues in the case, the court found the facts in favor of plaintiffs. It signed the statement of the facts found by it, and its conclusions of law, upon the application of plaintiffs, whose attorney presented the statement for its signature. This statement recites the verdict of the jury, and then states, as a finding of fact by the court, that, in *ordinary stages* of water, the effect of defendant's dam was to set back the water, and raise it on plaintiffs' land one and one-fourth inches, and that to relieve plaintiffs' wheels at such stages would require defendant's dam to be lowered three and three-fourths inches. To this statement of fact

defendant objected, and proposed in lieu thereof a materially different statement as to the effect of the dam. The court refused to insert this proposed statement in the statement of its findings. In other words, it declined to find the fact as so proposed by defendant, and, as the evidence in the case is not before us, we must presume it was right in so declining. Defendant then requested the court to find as to the effect of the dam in raising the water on plaintiffs' land in ordinary medium stages of water; also such effect in ordinary low stages of water, which the court declined to find.

The effect of the dam, in ordinary medium stages of water, or in ordinary low stages of water, is not the measure of defendant's right to maintain it. As held by this court in *Dorman v. Ames*, 12 Minn. 451, a riparian owner has no right to maintain his dam at such height that it will raise and set back the water upon the proprietor above him at the ordinary stage of water in the stream; and the term "ordinary stage of water" must be held to include its stage or level in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but not to include its stage or level in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year. With this definition of the rights of riparian owners, it is, on the question of the right to maintain a dam at a particular height, material only to measure its effect in raising and setting back the water in ordinary high water. That at an ordinary medium, or an ordinary low stage of water, the dam would not set the water back on the upper proprietor, does not establish the right to maintain it at its present height. Such facts would therefore be immaterial, and there would have been no propriety in the court finding them.

Defendant requested the court to find how high may the defendant's dam be allowed to stand, beyond which it need not be lowered to relieve plaintiffs' mill? Inasmuch as the court found the height of the dam, and how much it ought to be cut down, it did, in effect, find what was requested.

There were on the trial several request's by defendant to the court to charge the jury, all of which were refused; and the court also charged the jury upon matters of law. There were submitted to the jury nothing but simple questions of fact, not requiring for their determination the application of any rules of law. The application of such rules, and the determination of the rights of the parties upon the facts, were reserved for the court. The propositions contained in defendant's requests, and in the court's charge, were, so far as the trial of the issues submitted to the jury was concerned, mere abstract propositions, not affecting the determination of these issues. It is unnecessary to determine the correctness of those propositions.

The court, however, in relation to a matter of fact litigated on the trial, and which may have entered into and influenced the determination of the issues by the jury, expressed in its charge its opinion of the fact. This is claimed to have been error, and the case of *Caldwell v. Kennison*, 4 Minn. 23 (47,) cited to show it. That decision was under a statute (Pub. St. c. 61, § 22,) providing that if the court, in its charge, "present the facts of the case, it must also inform the jury that they are the exclusive judges of all questions of fact." The case cited held that it was error in the court to express an opinion on the facts without so informing the jury. That provision of statute, although it is retained as to the trial of criminal cases, was repealed as to the trial of civil causes in the Revision of 1866.

Without a statute on the subject, the trial court may express to the jury its opinion of the facts, (*People v. Vane*, 12 Wend. 78; *People v. White*, 14 Wend. 111; *People v. Rathbun*, 21 Wend. 509;) though it may may not, where there is a fair conflict of evidence, direct the jury how they shall find them. If a party fears undue influence upon the jury of what the court says in regard to the facts, he may request an instruction that the jury, and not the court, are to determine the facts. There was no error in the court expressing its opinion on the fact.

The judgment of the court is objected to, because it directs the dam to be cut down three and three-fourths inches below its then height; and it is claimed that, if an abatement was adjudged, the judgment should have specified the height at which the dam may be maintained, and directed it cut down to that height. The difference in this particular, between the judgment as it is and what it is insisted it should be, is very slight. What is to be done is definitely stated—to wit, to cut the dam down a certain amount. The sheriff who is to execute the judgment knows what to do. It is urged that the dam may be lower when the sheriff proceeds to execute the judgment than at the time of the trial. It is possible that it may be, but there is no presumption that it will be. And if, when the sheriff is about to cut down the dam, defendant claims that its height has, from any cause, been reduced below its height at the time of the trial, the court is entirely competent to ascertain the fact and instruct the sheriff accordingly. There is no error in this feature of the judgment.

It is also claimed that the judgment is erroneous because it directs the sheriff to cut down the dam; and it is insisted that it should have directed the defendant to do it. The statute in reference to actions for nuisances, (Gen. St. 1878, c. 75, § 44,) provides that “by the judgment the nuisance may be enjoined or abated, as well as damages recovered.” We think the judgment may direct the removal or abatement of the nuisance; and, when it does, it should also provide for its being done, and direct how and by whom it shall be done. As such removal is not an act which can be done only by the defendant in the action, there is no reason why the court may not direct it to be done by the sheriff, the proper officer to execute its judgments.

Judgment affirmed.

BERRY, J. I do not agree to that part of the foregoing opinion which holds that nothing but simple questions of fact, not requiring the application of any rules of law, were sub-

mitted to the jury. I think that the question as to the amount of plaintiffs' damages did involve the application of rules of law; but, as I am of opinion that defendant's rejected requests bearing on this question were properly rejected as unsound, and that the instructions of the court to which defendant objects, bearing upon the same questions, were correct, I concur in the result arrived at in the opinion.

EDGAR H. BASS *vs.* CITY OF SHAKOPEE.

October 8, 1880.

Municipal Corporation not capable of Contempt.—A municipal corporation cannot be guilty of contempt in disobeying an injunction. Such contempt, if any, in disobeying a writ of injunction directed to such corporation, is the contempt of individual persons; as, for instance, officers of the corporation.

Injunction.—The injunction in this case *held* to have been properly dissolved upon the facts appearing.

Appeal by plaintiff from an order of the district court for Scott county.

The defendant having built a bridge across the Minnesota river, and laid out a highway from the terminus of the bridge across the northwest quarter and lot 2 of section 1, town 115, range 23, within the corporate limits of defendant, commissioners were duly appointed to appraise the damages for land taken or injured by the proposed road. The road crossing land of plaintiff, the defendant served on him, on October 3, 1879, a notice that defendant had laid out a highway across lot 2, and the southwest quarter of the northeast quarter of section 1, town 115, range 23, and that the commissioners would meet on the following day at 7 o'clock P. M. to assess damages, etc. On October 4th, the plaintiff, on a verified complaint showing that defendant, without his consent, had begun to build embankments and dig ditches on his land, and

to remove the earth and trees therefrom, and had taken no steps whatever to acquire any lawful right to take his premises for the purposes of a highway, obtained, by order of a court commissioner, a writ of injunction restraining defendant from entering on his said premises, etc. The writ was issued and served on the mayor of defendant, on October 6th. On October 8th an order was made staying proceedings on the part of the plaintiff, for twenty days, and suspending the operation of the injunction until the hearing and determination of a motion to dissolve it, to be made immediately and on due notice by the defendant. This motion coming on to be heard, the plaintiff, on affidavits showing that defendant had disobeyed the writ while it was in force, objected to defendant's motion being heard or granted, on the ground that defendant, by reason of such disobedience, was in contempt. The objection was overruled by *Macdonald, J.*, and on the pleadings and affidavits on behalf of plaintiff and defendant, it was ordered that the injunction be dissolved; from which order the plaintiff appealed.

L. M. Brown, for appellant.

Henry Hinds and *E. Southworth*, for respondent.

BERRY, J. This is an appeal from an order dissolving an injunction. In contemplation of a motion for dissolution an order was made staying the operation of the injunction for 20 days, the motion to be made immediately. The propriety of the latter order, though much discussed by plaintiff's counsel, is manifestly not brought before us by this appeal. As to the motion to dissolve the injunction, it was objected by plaintiff in the court below that the defendant was in contempt for disobeying the injunction, and therefore not entitled to make the motion. The court below was of opinion that the defendant, a municipal corporation, could not be guilty of a contempt in disobeying an injunction; that such contempt, if any, in disobeying a writ directed to the city must be the contempt of individual persons; as, for instance, of officers of the city. We think this is the correct view of the

matter, and supported by authority. *Davis v. Mayor, etc., of New York*, 1 Duer, 451, 484, 509-10; *London v. Lynn*, 1 H. Bl. 206. The objection was properly overruled. We may add that, upon the affidavits *pro* and *con* the objection, we see no reason why the court below might not properly have come to the conclusion that there was no contempt of the injunction on the part of any person.

This brings us to the merits of the motion to dissolve the injunction; and upon perusing the papers used upon the hearing, we are of opinion that the case was one in which the prosecution of an important public work was interfered with by the injunction; that the injury occasioned by the completion of such work would be of no great account even if the work were unlawful; that, if there were any doubt as to whether the city had acquired the right to prosecute the work, the expenditures already made in constructing the bridge would, undoubtedly, lead to the speedy acquisition of such right by proceedings to condemn or otherwise; and, finally, that upon the facts appearing it was at least a matter of great doubt whether the city had not fully acquired a right to prosecute the only work covered by the injunction upon which the city was engaged, or which it proposed to engage in, until it had acquired a clear right so to do, to wit, the work of constructing and completing the approach to the bridge upon the land claimed to be owned by Hinds, from whom the city had obtained a release. In these circumstances we think that, in the exercise of a proper discretion, the judge below was warranted in dissolving the injunction.

Order affirmed.

After the foregoing appeal was entered in this court, and before the first term at which it could be heard, the plaintiff, on February 27, 1880, moved for an order directing the defendant to stay all proceedings relating to or connected with the matters involved in the action and appeal until the final

determination of the appeal. The affidavit in support of the motion stated that on taking the appeal to this court, the plaintiff had filed in the district court the proper bond for staying all proceedings on the order appealed from, and that, nevertheless, the defendant, by its agents and servants, since the appeal was taken and the bond filed, had taken and was then threatening to take further proceedings to seize and appropriate plaintiff's land for the highway before mentioned, notwithstanding the appeal and bond. The motion was opposed by counter affidavits. After argument by the counsel above named, the following opinion was filed on March 1, 1880:

GILFILLAN, C. J. The matter set forth as grounds for an order to stay proceedings on the part of the defendant, pending the appeal in this cause, are not in any way involved in the action, nor included within the injunction. Whether the renewal of proceedings to condemn the land in question be regular or not, cannot be tried in this motion.

Motion denied.

PHILIP SCHUSTER vs. SUPERVISORS OF THE TOWN OF LEMOND.

October 8, 1880.

37	253
40	370
27	253
46	239
27	253
80	45

Order discontinuing Road—Who may Appeal.—The appeal given by Gen. St. 1678, c. 13, §§ 59-62, from an order of town supervisors laying out, altering or discontinuing a road, can be claimed only by one who is in position to sustain special injury, not common to himself with the other inhabitants or property owners of the town, from the laying out, altering, or discontinuing the road. One to, through, or along whose land an old road to be altered or discontinued runs, is in position to claim such appeal.

Schuster appealed to the district court for Steele county from an order of the supervisors of the town of Lemond in that county, vacating a certain highway. In his application to the district court, he sets forth that this highway is an old

and well-travelled road, running from his farm (on which he resides) directly to the school-house of the district in which his land is situated, and only about eighty rods distant, and by reason of the discontinuance of the road, he will be compelled to go a distance of one and one-half miles further to reach such school-house; and he further shows that by the discontinuance of the road the distance from his farm to his nearest market town is increased nearly two miles, and he can only reach a travelled highway by travelling half a mile over a road (nearly half of which runs on his own land) which will not be travelled or kept open in winter except by persons passing from his land; and that he will be damaged in the sum of \$500 by such discontinuance. The appeal was brought to reverse entirely the proceedings of the supervisors. On respondent's motion the appeal was dismissed by *Lord, J.*, and Schuster appealed to this court.

Lewis L. Wheelock, for appellant.

Amos Coggsell, and *J. M. Burlingame*, for respondents.

GILFILLAN, C. J. The only question here is the right to appeal to the district court from the order of town supervisors laying out, altering, or discontinuing a road, under the provisions of Gen. St. 1878, c. 13. The district court denied the right to this appellant, and dismissed his appeal. That there is a right of appeal in such cases (to be taken to the district court if the damages claimed exceed \$100) was decided by this court in *Gorman v. Supervisors, etc.*, 20 Minn. 392. The only question left is, is appellant entitled to claim such appeal? The language of the statute (section 59) is: "Any person who shall feel himself aggrieved" may appeal. This is not to be taken literally. A person having no interest which could be affected might imagine himself aggrieved, yet the statute could not have intended to give such a person a right to appeal. The person claiming the right must undoubtedly be in position to be injuriously affected by the order or determination made; in position, as we think, to sustain special injury, disadvantage or inconvenience, not

common to himself with the other inhabitants or property owners of the town. One through whose land a new road is laid out is in such a position; and so is one through, to, or along whose land an old road to be altered or discontinued runs. The appellant's petition shows that he may be injuriously affected in a special manner by the discontinuance of one of the roads ordered discontinued. He is therefore in position to claim the right of appeal, and the order of the district court dismissing his appeal was erroneous and is reversed.

27	255
46	27

MILTON M. WILLIAMS, Assignee, vs. J. C. FROST, Sheriff.

October 8, 1880.

Assignment of Partnership Property for Benefit of Creditors, made by one Partner only.—An assignment for the benefit of creditors, executed by one partner for his firm in the absence of his copartner in Holland, *held*, upon a consideration of the facts appearing, to have been expressly authorized and fully assented to by the absent partner. The assignment, so far as here important, is as follows:

"This agreement, made this 27th day of January, 1879, by and between George H. Fairbanks, as one of the copartnership firm of Fairbanks & Vandervelde, composed of the said George H. Fairbanks and Neco J. Vandervelde, and doing business, under said firm name of Fairbanks & Vandervelde, as merchants, at Anoka; * * and whereas the said George H. Fairbanks and Neco J. Vandervelde * * are insolvent; and whereas the said * * Vandervelde is now * * absent from the United States: * * Now, therefore, this deed witnesseth that the said George H. Fairbanks, as one of said copartners, in consideration of the premises, and of the sum of one dollar to him in hand paid, * * does hereby grant, bargain, sell and convey, assign, transfer, set over unto said party of the second part, all the property—real, personal, and mixed—of the said copartnership. * * In witness whereof, the parties of the first and second part have hereunto set their hands and affixed their seals, the day and year first above written.

"GEORGE H. FAIRBANKS. [Seal.]

"JOHN J. PENNER." [Seal.]

Penner was the original assignee and party of the second party. *Held*, that as respects the manner of its execution, the assignment is, in sub-

stance and effect, the same as if, instead of signing it by his own name alone, Fairbanks had signed it in this way, "Fairbanks & Vandervelde, by George H. Fairbanks," and that it is the assignment of the firm.

Same—Subscription and Acknowledgment.—Gen. St. 1878, c. 41, § 23, requires such assignments to be in writing, subscribed by the debtor or debtors, and duly acknowledged before an officer, etc. *Held*, that the subscription above mentioned, and the acknowledgment by Fairbanks alone, are a sufficient compliance with the statute.

Plaintiff as assignee of the firm of Fairbanks & Vandervelde, (and duly appointed successor of John J. Penner, the original assignee,) brought this action in the district court for Anoka county to recover the value of certain personal property taken and sold by the defendant, as sheriff of that county, by virtue of an execution against the firm. At the trial, before *Young, J.*, the plaintiff had a verdict; a new trial was refused, and the defendant appealed.

Cross & Hicks, for appellant, cited *Story on Partnership*, § 101; *Dickinson v. Legare*, 1 Desaus. (So. Car.) 536; *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477; *Diming v. Colt*, 3 Sandf. 284; *Fisher v. Murray*, 1 E. D. Smith, 341; *Welles v. March*, 30 N. Y. 344; *Wetter v. Schlieper*, 4 E. D. Smith, 707; *Kelly v. Baker*, 2 Hilton, 531; *Brooks v. Sullivan*, 32 Wis. 444; *Dana v. Lull*, 17 Vt. 390; *Stein v. La Dow*, 13 Minn. 412; *Hardman v. Bowen*, 39 N. Y. 196; *Holland v. Drake*, 29 Ohio St. 444; *Cook v. Kelly*, 14 Abb. Pr. 466; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *De Camp v. Marshall*, 2 Abb. Pr. (N. S.) 373; *Britton v. Lorenz*, 45 N. Y. 51; *Julian v. Rathbone*, 39 N. Y. 369; *Kercheis v. Schloss*, 49 How. Pr. 284.

Chas. D. Kerr, for respondent.

BERRY, J. The question in this case is whether a certain assignment for the benefit of creditors, made in January, 1879, is valid against an attaching creditor. The important facts are these: George H. Fairbanks and Neco J. Vandervelde were partners in trade, doing business at Anoka, in this state, under the name of Fairbanks & Vandervelde. The firm was in debt and insolvent. Between January 1 and 5, 1879, Vandervelde went to Holland, having been called there

by the illness of his mother. He remained until after her death, returning to this country in April following. Before he went to Holland he knew, as he expresses it, that "the condition of our firm financially was pretty ragged; that there were bills to be paid soon, and no funds to pay them with," some of the creditors having already pressed for payment. "I left," he says, "Fairbanks in charge of the business. I left in a hurry, and told him to do the best way he knew how, and whatever he should do I would be satisfied with. I left everything about the business and management of same to Fairbanks. * * * I told him to do what was best. I left it for him to do what in his judgment was best, in view of the financial condition of the firm." The testimony of Fairbanks is to the effect that when Vandervelde left there were large bills coming due from the firm—some already due when he left—no cash with which to pay them—business light; that on January 27th, when the assignment was made, the firm was in bad shape, and creditors were pressing for the payment of their bills. Fairbanks also testified that, when Vandervelde left, he told him to do the best he could and he would be satisfied. This testimony does not appear to have been contradicted in any way. We have no doubt that it shows that Vandervelde expressly authorized Fairbanks to do anything that he could lawfully do in reference to the business and assets and indebtedness of the firm. One thing which he could lawfully do was to make an assignment of the assets of the firm for the benefit of creditors, with the assent of his copartner. Burrill on Assignments, (3d Ed.) 108, 330; *Stein v. La Dow*, 13 Minn. 412. In this case full authority to make such assignment, and full consent to the same, were included in the general authority to Fairbanks to do anything which he could do, as before stated. We have no doubt, then, that Fairbanks was authorized to make an assignment of the firm property.

The next inquiry is, was the assignment in proper form to

bind the firm? As respects this inquiry, the important parts of the assignment are these, viz.:

"This agreement, made this 27th day of January, A. D. 1879, by and between George H. Fairbanks, as one of the copartnership firm of Fairbanks & Vandervelde, composed of the said George H. Fairbanks and Neco J. Vandervelde, and doing business under said firm name of Fairbanks & Vandervelde, as merchants, at Anoka; * * * and whereas the said George H. Fairbanks and Neco J. Vandervelde * * * are insolvent; * * * and whereas the said * * * Vandervelde is now * * * absent from the United States: * * * Now, therefore, this deed witnesseth that the said George H. Fairbanks, as one of said copartners, in consideration of the premises, and of the sum of one dollar to him in hand paid, * * * does hereby grant, bargain, sell and convey, assign, transfer, set over unto said party of the second part, all the property, real, personal and mixed, of the said copartnership. * * * In witness whereof the parties of the first and second part have hereunto set their hands and affixed their seals, the day and year first above written.

"GEORGE H. FAIRBANKS. [Seal.]

"JOHN J. PENNER." [Seal.]

Penner was the original assignee and party of the second part. In our opinion, as respects the manner of its execution, this assignment is in substance and effect the same as if, instead of signing it by his own name alone, Fairbanks had signed in this way: "Fairbanks & Vandervelde, by George H. Fairbanks." His intention to act for the firm in making the assignment, and the fact that he did so act, unmistakably appear on the face of the assignment itself, and emphatically so from the use of the expressions, "George H. Fairbanks, as one of the copartnership firm of Fairbanks & Vandervelde," and "as one of said copartners." The seal, if one be necessary, is good as the seal of the firm, in ac-

cordance with a familiar rule. The assignment is, therefore, that of the firm.

It is urged, however, that it fails to comply with that provision of the act of March 4, 1876, (Gen. St. 1878, c. 41, § 23,) which requires assignments by debtors for the benefit of creditors to "be in writing, subscribed by such debtor or debtors, and duly acknowledged before an officer," etc. We think the subscription and acknowledgment of this assignment sufficient. The subscription is that of the firm, by one of its members. It is in effect the usual way in which a firm subscribes a written instrument. The acknowledgment is properly that of the subscribing parties, for an acknowledgment must be a personal thing.

The remaining point as to the admissibility in evidence of the assignment, under the allegations of the complaint, is disposed of by what we have already said as to the point that the assignment is that of the firm.

Order affirmed.

97	259
45	70

JOHN W. SHEEHY vs. HENRY HINDS.

October 9, 1880.

Tax Deed under Gen. St. 1866, as Evidence of Title.—*Grove v. Coffin*, 14 Minn.

345, followed, as to the effect of a tax deed which purports to have been executed under Gen. St. 1866, c. 11, § 139, as *prima facie* evidence of title, where it is not shown that the land sold had not been redeemed when the deed was made. To give a tax deed made under that section any effect as *prima facie* evidence of title in the grantee, it must show upon its face, by some recital or otherwise, that the sale which was made was for taxes that had become due and delinquent, and were unpaid at the time of the sale.

Tax Sale not held pursuant to Notice.—A delinquent tax sale under the provisions of that chapter, commenced on a day other than that named in the public notice of sale attached to the delinquent list, is void.

Tax Deed void on its Face—Statute of Limitations.—The provisions of section 154 of that chapter have no application to the case of a claim of title founded upon a tax deed which is void upon its face.

Plaintiff brought this action in 1876 in the district court for Scott county, alleging that he was the owner in fee and in possession of a certain described quarter-section of land in that county, that the defendant claimed some interest therein adverse to the plaintiff, and that such claim was unfounded, and praying judgment that defendant's claim be determined to be unfounded, and that the defendant be barred of and enjoined from setting up any claim thereto, and that plaintiff's title and possession be quieted. The defendant answered, pleading title in fee in himself by virtue of certain tax proceedings, sales and deeds, and also pleading that the action was not commenced within three years after the respective sales. At the trial before Macdonald, J., the plaintiff was permitted, under objection and exception, to amend his complaint by striking out the averment of possession, and inserting in lieu thereof an averment that the premises "are vacant and unoccupied." The plaintiff proved title in fee in himself from the United States, and the defendant put in evidence his tax deeds, etc. Upon the findings of the court, judgment was entered for plaintiff, and the defendant appealed. The facts in relation to defendant's tax deeds are stated in the opinion.

Henry Hinds, appellant, *pro se*.

William Louis Kelly, for respondent.

CORNELL, J. Defendant claims title to the premises in controversy as the owner in fee under certain tax deeds, set forth in his answer, the validity of which he insists cannot be impeached or questioned, because more than three years have elapsed since the tax sales occurred in pursuance of which the deeds were executed. It appears that the premises were first sold in separate parcels, of 40 acres each, for taxes levied for the year 1867, on the fourth day of June, 1868; that certificates of sale were then given to the defendant as purchaser, who afterwards, on the eighth day of May, 1876, surrendered the same to the county auditor, and took tax deeds therefor. According to the findings, it is not shown that the

premises had not been redeemed from the sale prior to the execution of these tax deeds, and, within the decision in *Greve v. Coffin*, 14 Minn. 345, they are not even *prima facie* evidence of any title in the defendant.

The other sale upon which defendant's claim of title rests took place on the eleventh of June, 1870, and the tax deeds which were executed in pretended pursuance thereof were made and delivered on the eighth day of May, 1876. These deeds were alike in form. They each, among other things, recite that the treasurer of Scott county "did, on the eleventh day of June, A. D. 1870, at, etc., in conformity with all the requirements of the several acts in such cases made and provided, expose to public sale the tract of land" therein described, for the sum of \$8.56, being the amount of taxes for the year 1869, with interest and costs chargeable on said tract of land, and that the said defendant bid off the same for that sum, which he paid to the said treasurer. These recitals wholly fail to show any authority in the county treasurer to make the sale which he did. Under the statutes then in force (Gen. St. 1866, c. 11) no county treasurer had any authority to sell land for taxes, except the same had become delinquent, and the owner of the land had failed to make payment thereof, with the accrued penalty, prior to the time of offering it for sale. Gen. St. 1866, c. 11, §§ 118-122. Upon the face of the deeds in question it is not apparent that the taxes for which the lands were sold were delinquent and unpaid at the time, or that the sale was made because of such delinquency and non-payment. As the deeds do not recite enough to show any authority to sell, they do not show any authority in the county auditor to make them, and hence are wholly ineffectual as evidence of any title in the defendant. *Cogel v. Raph*, 24 Minn. 194.

It is also established as a fact, by the findings, that the delinquent tax sale at which the lands in question were sold was noticed for the first Monday of June, but that the sale itself actually commenced on the eleventh day of that month.

This of itself rendered the sale void. *Cooley on Taxation*, 338; *Prindle v. Campbell*, 9 Minn. 197 (212.) The sale itself being void, and the deeds being insufficient to make a *prima-facie* case of title in the defendant, the question discussed as to the effect of the statute of limitations provided by section 154 of said chapter 11 of the General Statutes does not arise, as nothing is shown to have occurred to set the statute in motion. The answer contains no counterclaim requiring a reply. *Broughton v. Sherman*, 21 Minn. 431. The amendment to the complaint was a matter in the discretion of the court, and it is difficult to see how the defendant was prejudiced by it. That under it he could not interpose any claim of lien for taxes is unimportant, for he had made no claim of that character, and it does not appear that he desired to.

Judgment affirmed.

TAMM BIXBY vs. GEORGE WILKINSON.

October 9, 1880.

Judgment on Special Findings, there being no General Verdict.—The trial of the issues of fact herein was conducted by both parties upon the theory that certain specific questions of fact covered all matters of fact in actual dispute and litigation between them, and there was no conflict of evidence upon any other matter. In giving the case to the jury the court, without objection, submitted said questions for special findings thereon, stating at the time that it would direct such general verdict as might be authorized by such special findings. The findings being all in favor of the plaintiff, judgment was entered in his favor, under the direction of the court, for the amount claimed in the complaint, without the formal entry of any general verdict. *Held*, not error requiring a new trial or a reversal of the judgment; it appearing from the admissions in the pleadings and the uncontradicted evidence in the case, taken in connection with the special verdict, that the plaintiff was clearly entitled to a general verdict in his favor for the amount of the judgment.

Action on a written contract whereby the plaintiff agreed with the defendant to build a party-wall along the line be-

tween them in the city of Red Wing, one half of the thickness of the wall to be on the premises of each; the basement or cellar part of the wall to be of stone and of prescribed dimensions, and the part above the cellar to be of brick, 28 feet high, 70 feet long, and one foot in thickness; and the defendant agreed to pay the plaintiff \$264 "for doing said work, and for an equal undivided one-half in fee simple of said cellar and brick wall, and to pay the same when said work is done and said walls are completed." The plaintiff built the wall as agreed on, except that, instead of the wall above the basement being entirely of brick, he put in it, at the end fronting the street, a stone pilaster, 13 feet high, 16 inches wide, and 10 inches thick.

After the decision of the former appeal in the action, (reported 25 Minn. 481,) the plaintiff amended his complaint by inserting an averment that "the wall was built in the usual, ordinary and customary manner of performing said work and of constructing like walls in said Red Wing, and as provided for in said contract, and agreement, save and except that said plaintiff did, with the knowledge and consent of said defendant, construct and put upon a portion of the front end of said brick wall a stone pilaster," etc.

At the trial in the district court for Goodhue county, before Crosby, J., the court submitted to the jury certain questions, informing them that the court would direct such general verdict as should be authorized by their answers thereto. The questions and the answers of the jury are as follows:

1. Is the wall with the stone pilaster what, in the custom of the business of building in the city of Red Wing, is regarded as a brick wall. *Answer.* Yes.

2. Did the defendant consent that the wall with the stone pilaster should be built in lieu of a wall entirely of brick? *Answer.* Yes.

3. Did the defendant accept the wall with the stone pilaster in lieu of a wall entirely of brick? *Answer.* Yes.

No general verdict was returned. On plaintiff's motion,

judgment was entered in his favor for the amount of the contract price with interest and costs, and the defendant appealed.

Charles N. Bell, for appellant.

J. C. McClure, for respondent.

CORNELL, J. In submitting this case to the jury, the court, without objection from either party, directed them to return a special verdict in answer to three separate questions propounded to them, stating that it would direct such general verdict as might be authorized by their answers to such questions. An examination of the settled case clearly shows that these questions embraced every material matter of fact which was in issue under the pleadings, concerning which there was any conflict of evidence, or any dispute or controversy at the trial. It was tried upon this theory, both by the court and the parties. Neither party requested a finding by the jury upon any other matter than those covered by the special questions submitted, nor was it suggested by either party that either of the questions thus submitted to be passed upon was not a proper matter for the determination of the jury under the pleadings. The specific findings returned in answer to the questions thus submitted, taken in connection with the uncontradicted evidence and the admission of the defendant's counsel on the trial as to all other matters, clearly show that the plaintiff was entitled to a general verdict in his favor, and it would not have been error for the court to have directed such general verdict upon the coming in of the special verdict. The omission to do so was a mere matter of form, affecting no substantial right; for the judgment which was rendered was the same in its effect as though a general verdict had been actually rendered under the direction of the court. *Hutchinson v. Chicago & Northwestern Ry. Co.*, 41 Wis. 541, 553; *McNara v. Chicago & Northwestern Ry. Co.*, Id. 69; *Williams v. Porter*, Id. 422.

The evidence is sufficient to support the special findings. The fact testified to, under objection, in response to the ques-

tion as to the usual and ordinary way of constructing partition walls of the kind in controversy in Red Wing, was proved by other testimony, not objected to; and hence, whether the ruling on that question was correct or not, it is evident that it did no harm and furnishes no ground for a new trial. The point that no contract was in fact made between the parties was not raised in the court below, and it is now too late to make it after the case has been litigated upon a different theory. In respect to the point that "it does not appear that plaintiff has ever offered or has ever been willing to convey to defendant an equal undivided one-half in fee simple of said cellar and brick wall," it is sufficient to say that such a conveyance is not made by the contract a condition precedent to the payment which defendant obligated himself to make.

Judgment affirmed.

CLARINDA MOREY vs. ABIJAH MOREY.

27	266
30	337

October 9, 1880.

Decree of Divorce in another State—Inquiry into Jurisdiction of Court—Whenever a fact of divorce is sought to be proved by a certified transcript of the record of a decree of divorce rendered in another state, the validity of the decree may be inquired into and questioned for want of jurisdiction, if that defect affirmatively appears upon the face of the record itself as so certified.

Recital in Record of Manner of Service of Process.—When, in respect to the service of process upon a party defendant, the record particularly specifies the kind and manner of service that was made, it will not be presumed, in the absence of any recital or averment in the record to the contrary, that there was any other or different kind or manner of service from that stated.

Service by Publication must conform with Statute.—Statutes which authorize, in lieu of a personal service of process upon a party, a constructive service by publication, must be strictly followed, in order to subject the party to the jurisdiction of the court issuing such process.

Ejectment for certain property in Winona county. Both parties claimed title through Andrew Morey, deceased, who died on June 18, 1876, seized of the premises described in the complaint as his homestead. The marriage of plaintiff with Andrew Morey, the death of Andrew Morey seized of the premises as a homestead, and the possession of defendant adverse to the plaintiff, were admitted in the pleadings. At the trial in the district court for Winona county, before *Mitchell, J.*, the plaintiff having rested her case, the defendant offered evidence proving that he entered into possession under the last will of Andrew Morey set forth in his answer, and also proved that in January, 1870, a marriage was contracted between Andrew Morey and one Harriet Stinson, conceded to be legal provided Andrew Morey was then divorced from plaintiff, and that said Harriet, in April, 1878, claiming to be the widow of Andrew Morey, conveyed all her interest in said homestead to defendant. The only defence made to plaintiff's right to recover possession of the premises was that the plaintiff was not the wife of Andrew Morey at the time of his decease, but had been divorced from him; and the only evidence offered to sustain the defence was the record of proceedings had before the circuit court of Adams county, Wisconsin, (which are stated in the opinion,) and the laws of Wisconsin relative to such proceedings.

The court found that plaintiff was not entitled to possession of the premises, and that the defendant was entitled to judgment. A new trial was refused, and the plaintiff appealed.

Wilson & Gale, for appellant.

A. N. Bentley, for respondent.

CORNELL, J. The requirement of the federal constitution, that "full faith and credit shall be given in each state to the records and judicial proceedings of every other state," has no application to decrees and judgments in actions wherein the court has acquired no jurisdiction over the parties to be thereby affected. *Bissell v. Briggs*, 9 Mass. 462. If, there-

fore, upon an inspection of the record from another state, want of jurisdiction is disclosed as to a necessary party, the judgment or decree will be held void and of no effect as to such party, even in a collateral proceeding. *Hahn v. Kelly*, 34 Cal. 391. In determining the question of jurisdiction from such inspection, in a case where the record itself shows a particular mode or manner in which jurisdiction over the person of the defendant was acquired, it will not be presumed to have been obtained in any other way, in the absence of any averment or recital to that effect. *Settlemyer v. Sullivan*, 97 U. S. 444; *Falkner v. Guild*, 10 Wis. 563.

In this case the certified transcript of the record of the divorce proceedings, which was introduced in evidence, under objection, makes this showing: On the 24th day of November, 1856, one Andrew Morey, the then husband of Clarinda Morey, the appellant herein, commenced a suit against her in the circuit court of Adams county, in the state of Wisconsin, for a divorce, on the ground of desertion, by filing on that day his bill of complaint with the clerk of that court, in which it was stated that she, the said defendant therein, "was then living in the state of Vermont." Thereupon, pursuant to the prayer of the complaint, a writ of subpœna was issued to the sheriff of said county of Adams, commanding him to summon the said defendant, Clarinda Morey, to appear and answer said bill of complaint at a time which was therein named. The return of the officer to this writ states that he was unable to find said defendant in his county. Upon filing this return, and an affidavit of complainant's solicitor tending to show her non-residence, an order was made on the 30th of December, 1856, in substance as follows: "It satisfactorily appearing to this court, upon inquiry, that the defendant cannot be found within this state, and has not caused her appearance to be entered in this court, * * on motion of complainant's solicitors it is ordered that the defendant appear, plead, answer or demur to the complainant's bill of complaint in this cause by the — day of March, A. D. 1857, and in default thereof

that the said bill be taken as confessed by the said defendant; and it is further ordered that a copy of this order be published within 20 days from this date in the *Badger State*, a newspaper published at Portage, at least once in each week for six successive weeks." Proof by affidavit was made of the publication of this order, with the blanks in the date filled as of the first day of March, for "the term of six weeks; the first publication being on or about the sixteenth day of January, A. D. 1857." Testimony was thereupon taken, and the decree was entered dissolving the marriage between the parties to said suit. There is no recital in the decree, or in any part of the record, indicating any appearance of the defendant in said suit, or that any process was served upon her in any other way than as above stated.

Upon this showing the court below correctly finds that "the said Clarinda Morey never appeared in said action, and had no actual notice of its institution or pendency till after final judgment therein, nor was any process ever served upon her, except by publication as above stated." Was this a sufficient constructive service of process upon the defendant in that suit to confer jurisdiction? According to the laws of the state of Wisconsin in force at that time, as found by the district court herein, it was provided that if it appears by affidavit or otherwise that the defendant in an action is out of the state, the court may by order direct such absent defendant to appear, plead answer or demur, *at a certain day therein to be named, not less than three nor more than six months from the date of such order*; which order shall, within twenty days thereafter, be published in one or more of the newspapers printed in the state for six weeks successively, at least once in each week; and that, upon proof of such publication of such order to the satisfaction of the court, the complainant's bill may be taken as confessed, in case defendant fails to appear and plead. Rev. St. Wis. 1849, c. 84, § 18.

Statutes of this character, which provide for a constructive service of process by publication as a substitute for personal

service, must be strictly pursued in order to bring a party within the jurisdiction of the court. *Gray v. Larrimore*, 2 Abb. (U. S.) 542; *Settlemer v. Sullivan*, 97 U. S. 444. The order which was made and published in this case only gave the defendant two months in which to appear and plead. Its publication, therefore, was of no avail as notice to the defendant, as it was unauthorized by the statute, and the judgment founded on it was a nullity. *Brownfield v. Dyer*, 7 Bush, (Ky.) 505.

Order reversed.

STATE OF MINNESOTA *vs.* JOHN J. PENNER and another,
Executors.

27	200
40	471

October 9, 1880.

Return of Sheriff is Conclusive upon him and his Representatives.—The return of a sheriff to a writ of attachment is conclusive upon him as to the truth of all matters stated in it, concerning which it was his duty to make a return, so far as to estop him from contradicting the same in any action between him and the attaching creditor, involving the question of his liability to such creditor in respect to property attached under the writ, or its proceeds. The legal representatives of the sheriff, in case of his decease, are affected by the same rule.

In an action brought by the state against the Pine City Lumber Company, a writ of attachment was issued and delivered to one J. C. Becht, who was then sheriff of Ramsey county, who, by virtue thereof, on January 17, 1877, levied upon and took into his possession a quantity of lumber and other personal property belonging to the company. On February 26, 1877, an execution against the lumber company on a judgment in favor of one Merriam was placed in the hands of Becht as sheriff, who levied such execution on the same property before attached by him. The state having recovered judgment in its action against the lumber company, execution was issued thereon, and placed in the hands of Becht, as sher-

iff, on January 28, 1878. On the same day he made return to the writ of attachment as follows: "I certify and return that I have, on the 17th day of January, 1877, by virtue of within writ of attachment, levied upon and attached as the property of the Pine City Lumber Company, the following described personal property, (describing it fully.) John C. Becht, sheriff of Ramsey county." On February 5, 1878, Becht, as sheriff, under the execution in favor of Merriam, sold the property attached and levied on, and paid over the amount realized, less his fees, to Merriam's attorneys, and on February 13, 1878, returned that execution satisfied to that extent.

Becht having afterwards died, the state presented to the commissioners on his estate a claim for the money so paid over by him on the Merriam execution. The claim was allowed, and Becht's executors appealed to the district court for Ramsey county. At the trial in that court, before *Wilkin, J.*, the plaintiff proved the facts above set forth, and also an endorsement in Becht's handwriting on the execution in favor of the state, as follows: "Received for service January 28, 1878, John C. Becht, sheriff of Ramsey Co., Minn." The plaintiff then put in evidence (under objection and exception) an endorsement on the execution, in the handwriting of one of Becht's deputies since deceased, but not signed: "I John C. Becht, sheriff of Ramsey county, do hereby certify that under and by virtue of a writ of attachment duly issued and to me delivered in the within-entitled action, on the 17th day of January, 1877, I did attach and levy upon, as the property of the within-named defendant, the Pine City Lumber Company, the following described personal property." [Here follows a description of the property identical with that in the return to the writ of attachment.] "I further certify that I have received the within execution on the 28th day of January, 1878, and that under and by virtue of the said execution I now hold and retain my levy on said property and all my rights acquired therein by virtue of said writ of attachment."

The plaintiff having rested its case, the defendant offered to prove that in December, 1877, the attorney general, with full notice of the levy and intended sale under the Merriam execution, notified the sheriff that the levy and lien under the attachment of the state were abandoned, released and waived by the state; and that the sheriff, relying on such notice, thereupon proceeded to sell under the Merriam execution and to pay over the proceeds to Merriam's attorneys. The proof offered was excluded on plaintiff's objection, as incompetent and immaterial, and thereupon the court instructed the jury to return a verdict for the plaintiff. A new trial was refused, and the defendants appealed.

H. J. Horn, for appellants.

The order or notification, offered to be proved, given to the sheriff by the attorney general—the attorney of record for the state—directing or notifying him to abandon or release the levy or that it had been abandoned or released, would, when acted on by the sheriff, operate as an abandonment of the levy, or, at least, would postpone the lien of the state to that of Merriam, the junior lien creditor. Freeman on Executions, § 271; *Ross v. Weber*, 26 Ill. 221; *Truitt v. Ludwig*, 25 Pa. St. 145; *Kaufelt's Appeal*, 9 Watts, 334; *Eberle v. Mayer*, 1 Rawle, 366; *Kellogg v. Griffin*, 17 John. 273; *Knower v. Barnard*, 5 Hill, 377; *Michie v. Planters' Bank*, 4 How. (Miss.) 130; *Wise v. Darby*, 9 Mo. 131; *Lowick v. Crowder*, 8 B. & C. 132.

The effect of a sheriff's return upon his writ is held by this court to be conclusive upon parties and privies, and *prima facie* upon strangers, and not liable to impeachment, *except* in direct proceedings to which the officer is a party. *Tullis v. Brawley*, 3 Minn. 277. See, also, *Browning v. Hanford*, 7 Hill, 120; *Whitehead v. Keyes*, 3 Allen, 495. To a certain extent the return becomes part of the record of the suit, and so far concludes parties and privies for that reason. The sheriff, however, is not a party to the record, and when he is concluded it is by way of estoppel. Crocker on Sheriffs, § 46;

Bigelow on Estoppel, 495; 2 Greenl. Ev. § 587; *Stimson v. Farnham*, Law Rep. 7 Q. B. 175. It is therefore held that his return showing the receipt of money on an execution will conclude him as to the fact that the money was paid to him, but not from showing the execution creditor is not legally or equitably entitled to it. 2 Greenl. Ev. § 588. He may show that another than the execution creditor is entitled to the money, as owner of the goods sold, or assignee in bankruptcy of the debtor, or as a prior lien creditor, or as a junior execution creditor who has obtained priority by matter *in pais*, as by the laches or the direct act of the senior creditor. And the sheriff would be obliged to pay the money to a creditor who was in fact entitled to it, of whose rights he had notice, and could not be held liable for paying it to the person entitled to it. Unless directed otherwise by the court, the sheriff must make the distribution, and, in doing so, can only be liable in case he pays to a person not entitled to receive the money. Freeman on Executions, § 446; Crocker on Sheriffs, § 424; *Newland v. Baker*, 21 Wend. 264; *Stimson v. Farnham*, Law Rep. 7 Q. B. 175; *Learned's Adm'x v. Bryant*, 13 Mass. 223; *Ross v. Weber*, 26 Ill. 221; *Brydges v. Walford*, 6 Maule & Sel. 39; *Fuller v. Holden*, 4 Mass. 498; *Canada v. Southwick*, 16 Pick. 556; *Chapman v. Smith*, 16 How. 114. To conclude the sheriff, therefore, by his return, it must have contained a statement of fact upon which the state has relied and so acted that it will be prejudiced if the sheriff is allowed to deny the truth of the statement. Bigelow on Estoppel, 495; *Stimson v. Farnham*, Law Rep. 7 Q. B. 175; *Barker v. Benninger*, 14 N. Y. 270; *Dezell v. Odell*, 3 Hill, 215; *Caldwell v. Augur*, 4 Minn. 156 (217); *Castner v. Symonds*, 1 Minn. 310 (427); *Com'rs of Hennepin Co. v. Robinson*, 16 Minn. 381; *Northern Line Packet Co. v. Platt*, 22 Minn. 413. But in this case there is no proof showing that the state relied or acted on the return; and the fact that the return was filed after the money is paid is proof presumptive, at least, that the state did not rely on it.

Upon the facts offered to be proved, the state would be estopped, having notified the sheriff of the release and abandonment of the attachment levy, and the sheriff and Merriam having both acted on this statement of the state, in the sale and the payment and receipt of the money. *Com. v. Andre*, 3 Pick. 224; *Carver v. Astor*, 4 Pet. 1, 87; *Branson v. Wirth*, 17 Wall. 32, 42; *Nieto v. Carpenter*, 7 Cal. 527; *Magee v. Hallett*, 22 Ala. 699; *St. Paul, S. & T. F. R. Co. v. First Div., etc., R. Co.*, 26 Minn. 31; *Bigelow on Estoppel*, 262, 263. As to the effect of instructions by plaintiff's attorney to the sheriff, see *Rice v. Wilkins*, 21 Me. 558; *Stevens v. Colby*, 46 N. H. 163; *Simmons v. White*, 21 La. An. 590; *Willard v. Goodrich*, 31 Vt. 597; *Strong v. Bradley*, 13 Vt. 9; *Waterman v. Merrill*, 33 N. J. Law, 378.

The return on the attachment does not show that the levy continued in force, or that it was in force at the time of the sale, or when the money was paid over, or that it ever was a prior lien. The return merely shows that the attachment was levied on January 17, 1877. It does not assert that the property continued in the sheriff's custody, or that the levy remained in force, or that anything further was done under it. Gen. St. 1878, c. 66, § 159, relied on by plaintiff, provides that "when the writ of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought." The omission to state the fact of the discharge (if there was one) could not create an estoppel. The subsequent discharge of the levy could not, in the nature of things, affect the truth of the statement that a levy had been made on a certain day; nor could the state claim that it relied on any presumption that the levy was in force, by reason of the omission to note the discharge on the return; for (1) the state did not rely or act upon the return at all; and (2) the state knew or had notice of the fact of the discharge, it being the state's own act, and was therefore neither misled nor deceived. *Bigelow on Estoppel*, 467. And if any such presumption was raised

by the omission to mention the discharge in the return, it would not be conclusive, but could be rebutted. *First Nat. Bank v. Rogers*, 15 Minn. 381.

Geo. P. Wilson, Attorney General, for the state.

CORNELL, J. The return of a sheriff to a writ of attachment against the property of a debtor defendant is his official "answer under oath respecting the duty enjoined upon him by the writ, and is intended to inform the court of what has been done in the premises." *Browning v. Hanford*, 7 Hill, 120. Upon being made and filed, it becomes a part of the record in the action, and partakes of its nature, in that it imports absolute verity as to every statement of fact contained in it, concerning which it is his duty therein to speak. Hence, so long as it remains a part of the record, it cannot, as to any such statement, be controverted or questioned, in the action wherein it is made, by any of the parties thereto or their privies, for the purpose of invalidating the proceedings of the officer, or affecting any rights dependent thereon. *Brown v. Davis*, 9 N. H. 76. And because it thus affects and concludes the rights of the parties in the action, the sheriff is, as a general rule, in any controversy arising between him and any of said parties or their privies, estopped from denying the truth of his return as to all matters material to be returned. *Baker v. McDuffie*, 23 Wend. 289; *Drake on Att.* § 204; *Crocker on Sheriffs*, §§ 44, 46. If his return is erroneous in respect to any matter of fact therein stated, his remedy is to get it amended in accordance with the facts, upon application to the court and leave granted. To permit him to relieve himself from all responsibility to the parties for its correctness by proving its falsity, while it is allowed to stand uncorrected of record, and binding upon them, would be manifestly inequitable and unjust.

By the statute it is made the duty of a sheriff, whenever any such writ which has been placed in his hands for service is fully executed or discharged, to return the same, with his proceedings thereon, to the court in which the action

was brought. Gen. St. 1866, c. 66, § 142, (Gen. St. 1878, c. 66, § 159.) This contemplates a complete return of all his proceedings and doings under the writ, so far as they come within the scope of his official duties. In construing the return, when made, it is to be presumed, in the absence of a contrary showing upon its face, that the officer has done all that was required of him, both in the execution of the process and in the making of the return thereto. If, prior to his return, property has been attached, and subsequently released by a discharge of the writ, or otherwise, both those facts are required to be noted in the return. If the former only is stated and certified to, the presumption is that the officer continued to hold the property down to the time the return was made, as security for the satisfaction of whatever judgment might be recovered in the action by the attaching creditor, for that was the duty enjoined upon him by the writ under the statute. Gen. St. 1866, c. 66, §§ 128-132, (Gen. St. 1878, c. 66, §§ 145-149.) Proof of a release or discharge in such a case would directly contradict the legal effect of the officer's return in respect to a matter material for him to return fully and correctly, and hence is inadmissible in his favor as against a party to the action whose rights are affected by the return as made.

In the case at bar the return to the writ was made and filed in court on the 28th day of February, 1878. In it the sheriff certified officially that on the 17th day of January, 1877, he did, by virtue of said writ, levy upon and attach certain personal property therein described, and this comprises the whole of the return. Construed according to its legal effect, it showed a valid and subsisting levy remaining in force from the time it was made to the time when the return was filed, and that the levy had not then become dormant, nor in any way released or discharged. The trial court, therefore, rightly ruled that the defendants, as the legal representatives of the deceased sheriff, were estopped from asserting, as against the attaching creditor, the existence of

any facts tending to show any release or abandonment of such levy prior to the date of the return.

The return which was endorsed upon the execution in favor of the state against the Pine City Lumber Company was competent evidence. That the execution had been received by Sheriff Becht appeared from the endorsement thereon, signed by himself, showing its receipt by him on the 28th of January, 1878. The return was shown to be in the handwriting of his deputy, the one who had charge of the sheriff's office at the time of Becht's decease, and who subsequently turned over to his successor the papers belonging thereto, including the execution in question. The return was thus sufficiently authenticated as the official act of the sheriff to authorize its receipt in evidence. It recites the fact that the execution was received by the sheriff January 28, 1878, and that he then, by virtue of such execution, held and retained his levy upon the property theretofore made under the writ of attachment, and all rights acquired therein by virtue of said writ. This was all the levy under the execution that was required in such a case by the statute, (Gen. St. 1878, c. 66, § 301,) for the property was already in the custody of the officer, and it was subject to the lien of the judgment.

The fact that when the writ of attachment in question was issued another one was also issued to another county, without any new or additional bond and affidavit, does not affect the validity of the former, even if it is conceded that the latter was irregularly issued. Upon the uncontroverted facts disclosed by the evidence, the court rightly instructed the jury to render a verdict for the plaintiff, and its refusal to give the requests asked by the defendants was not error.

Order denying a new trial affirmed.

DAVID HORNING vs. CHARLES SWEET.

October 9, 1880.

Ejectment—Proof of Title by Plaintiff.—In an action to recover possession of real property, it is sufficient for plaintiff, upon an issue of title in himself, to prove a regular chain of title from a grantor who is admitted by the answer to have been a former owner in fee of the premises.

Ejectment for a lot of ground in the village of Alden in Freeborn county, the complaint alleging generally title in fee and right of possession in plaintiff, and a wrongful detention by defendant. The defendant in his answer denied plaintiff's title and right of possession, and alleged that in May, 1877, he constructed a building on the premises, under a contract with one H. N. Burhans, who was then the owner of the lot and held the same under and by virtue of a contract of purchase from one William Morin, who had the legal title to the premises. That his contract with Burhans was made with Morin's consent and approval, and provided that defendant might erect the building and occupy the same until such time, after two years from said date, as he, the said Burhans, should pay to the defendant the cost of construction of said building, being \$225, and that, on such payment, the defendant should vacate the premises after a reasonable notice, and that during the two years, and thereafter until the payment of the \$225, defendant might occupy the premises free of rent. The answer further alleges that defendant has fully complied with the terms of the agreement, and that plaintiff, ever since July 1, 1877, has had notice thereof and of the terms of the agreement; and that the plaintiff, if any title he has, has acquired the same through Burhans by an assignment of the contract with Morin.

The evidence in the cause was taken before a referee. The plaintiff, to prove his title, introduced in evidence (under proper objection) a certificate of the register of deeds of the county, stating "that Wm. L. Gray entered the northwest

quarter of the southeast quarter of section 3, township 102, range 23, as the same appears upon the record of original entries in the office of the register of deeds aforesaid;" also, (under proper objection,) a copy of the record of a deed of the same 40 acres from Wm. L. Gray to Augustus Armstrong, and a copy of the record of a deed of the same from Augustus Armstrong and wife to William Morin, each copy being thus certified by the register of deeds: "I, Ole O. Simonson, register of deeds in and for the county of Freeborn, in the state of Minnesota, do certify that the foregoing is a true copy of a deed from" (the grantor named to the grantee named,) "as the same appears of record in the office of register of deeds aforesaid, in book," etc. Plaintiff then introduced in evidence a conveyance in fee of the lot in question by Morin and wife to plaintiff, bearing date November 9, 1877, and duly recorded. Plaintiff also proved that the lot in question is part of the 40 acres before mentioned, and rested his case. The defendant thereupon moved to dismiss the action, and then introduced in evidence the bond for a deed, made by Morin to Burhans, pleaded in the answer, and an assignment of the bond to plaintiff, bearing date February 5, 1876, and recorded December 3, 1876, and also oral testimony tending to prove the averments of his answer.

The referee having made report of the evidence to the district court for Freeborn county, the cause was heard by *Page, J.*, who ruled that the register's certificate of the entry of the land by Gray was inadmissible, not being nor purporting to be a copy of any record, (Gen. St. 1878, c. 73, § 96,) and that the certificates to the other copies offered were insufficient under Gen. St. 1878, c. 73, § 65; that the copies offered were therefore inadmissible, and the plaintiff, when he rested, had not proved himself the owner or entitled to possession of the premises. The objections to the evidence were therefore sustained, and the motion to dismiss granted. Judgment was accordingly entered for the defendant, and the plaintiff appealed.

E. C. Stacy and John Whytock, for appellant.

John A. Lovely, for respondent

CORNELL, J. Upon the allegations of the answer defendant claims possession under an agreement with one Burhans, and he avers that when said agreement was made, Burhans "was the owner of the said lot and premises, and held the same under and by virtue of a contract of purchase of one William Morin, who had the legal title to said premises." The only reasonable interpretation that can be given to these allegations is that Burhans had acquired an equitable title to the lot under a contract of purchase from Morin, who was the owner in fee and held the legal title. It is evident, therefore, that defendant is claiming under a title derived from Morin.

In view of this fact, and the admission in the answer that the legal title to the lot was vested in Morin, proof by plaintiff that Morin had conveyed the property to him by absolute deed, duly made and executed, was sufficient, as against the defendant, to establish the fact of his ownership of the property in fee. Evidence of such a conveyance was given by plaintiff in the deed from William Morin and wife to David Horning, to the introduction of which there was no valid objection. No evidence other than the identity of the names was required to identify the grantor named in the deed with the William Morin mentioned in the answer, or the grantee as the plaintiff herein. There was no circumstance to rebut the inference that arises from an identity in respect to the names. 1 Whart. Law of Ev. § 739a. It follows from these views that the action was improperly dismissed, and that the judgment must be reversed and a new trial granted.

Ordered accordingly.

37	280
40	372
27	280
59	286

In the matter of the Probate of the Will of OVID PINNEY.

October 9, 1880.

Effect of Verdict on Appeal from Probate Court.—A verdict upon an issue in probate proceedings, on appeal to the district court, is as binding as in any other action, and is subject to the same rules as to setting it aside for insufficiency of evidence; following the decision in *Murren v. Dutcher*, 26 Minn. 391.

Error in Question cured by Answer.—The admission of an improper question to a witness, the answer to which is not responsive to the question, so far as it is improper, and which answer is proper evidence, is no ground for a new trial.

Evidence as to Testator's Mental Capacity — Opinions.—On an issue as to mental capacity, a witness, not an expert, cannot give an opinion generally as to such capacity, but must state facts within his knowledge, and his opinion must be based on such facts.

Same — Testator's Business Acts, Declarations, etc.—On such an issue the contents of an instrument executed by the party, if he did not read or hear it read, are immaterial. On such an issue the business acts of the person in question, and his declarations, oral or written, tending to show his comprehension or non-comprehension of daily occurrences in his business, or relating to his business, contracts executed by him or entries in his diary, all at or about the time in question, are admissible.

Same — Opinions as to Capacity.—On an issue of mental capacity to make a will, a question calling on a witness to state his opinion as to testator's capacity to make an intelligent disposition of his property *by will*, is not improper as calling for an opinion on testator's capacity to make a valid will.

Same — Proof of Capacity Subsequent to Date of Will.—On such an issue, where the only mental incapacity claimed was by gradual decay of the faculties from great age, it is proper to show, in order to prove sufficient capacity, that after the time in question, and without regard to how long after, the person had sufficient capacity.

Same — Proceedings on Application for Guardian.—On such an issue the record of the probate court, upon an application to appoint a guardian for the person in question, is not admissible.

Evidence — Testimony before Grand-Jury.—The only cases in which the testimony of a witness before the grand-jury may be disclosed, are those mentioned in Gen. St. 1878, c. 107, § 41.

Costs — Copy of Reporter's Notes.—The expense of procuring a copy of the reporter's notes of the trial, though not properly taxable in the costs in this court, may be taxed in the district court to the party succeeding in his motion for a new trial.

Appeal by the proponents of the will (the executors named therein) from an order of the district court for Hennepin county, *Young, J.*, presiding, refusing a new trial.

Benton & Benton and J. Guilford, for appellants.

Shaw & Levi and Lochren, McNair & Gilfillan, for respondents.

GILFILLAN, C. J. Ovid Pinney, over eighty years of age, made his will March 22, 1872, and died November 4, 1878. The will was presented for probate in the probate court of Hennepin county, and was contested on the ground of the mental incapacity of Pinney, and of undue influence exercised by certain persons named. It was, however, allowed and admitted to probate by the probate court. From the decree allowing it, the contestants appealed to the district court. In that court, issues upon the mental capacity of the testator, and the undue influence alleged, were framed and tried by a jury, who found that the testator was not at the time of executing the will of sound mind, and also found against the allegation of undue influence. From an order denying a new trial this appeal is brought. It was decided in *Marvin v. Dutcher*, 26 Minn. 391, that a verdict upon an issue in probate proceedings, on appeal to the district court, is as binding as in any action, and is subject to the same rules as to setting it aside for insufficiency of evidence. The rule is applicable to this case. Under those rules we see no reason to question the finding in this case.

Contestants introduced James J. Green as a witness, who testified to business relations and transactions with deceased sufficient to qualify him to express an opinion as to his mental capacity, within the rule that a witness not an expert must first disclose the facts upon which his opinion is based, before he can be allowed to express an opinion on mental capacity, and then can be allowed to state only his opinion formed from those facts. The question calling for the witness' opinion is criticised, because it called on him to state

his opinion of the testator's ability to do *important* business; and it is claimed that if the testator had capacity to transact ordinary business he might make a valid will, and that the question ought to have been as to ability to do ordinary rather than important business. Whether this is so or not it is unnecessary to decide, for the answer was not in this respect responsive to the question. The answer was that the testator was incompetent to transact business to any extent.

The questions put to the proponent's witnesses, Baker, Armstrong and Baldwin, were properly excluded, because they called for the opinions of the witnesses (who were not experts) generally, and not for opinions based on facts within their knowledge and disclosed by them. The bond in the case of *State v. Green*, executed by the testator, was properly excluded, because it does not appear that he read it, or heard it read, and the only evidence as to that point is to the effect that he neither read it nor heard it read. The contents of the bond, therefore, would be no evidence of his capacity to comprehend or transact business.

We do not think the questions put to the contestants' witnesses, Farnham and McIntosh, objectionable. They do not call for the witnesses' opinion of the testator's capacity to make a valid will, but of his capacity to comprehend his property and make an intelligent disposition of it by will. They called for no more than an opinion of his capacity to understand any disposition he might in a will make of his property. Certainly, if he could not understand that, he was not competent to make a will.

Exhibit 2, being the lease or agreement between testator and the Shoemakers, and the supplement thereto; Exhibits 20, 21, and 23, being extracts from the diary of the testator; and Exhibits 26, 27, and 28, being two mortgages and a contract executed by Broad to testator, were all proper items of evidence on the question of his mental capacity, and should have been admitted. It must be clear that, upon the

issue as to the testator's capacity to do business, evidence of his business acts at or about the time in question, and of his declarations, oral or written, tending to show his comprehension or non-comprehension of daily occurrences in his business, or relating to his business, would more satisfactorily show the condition and quality of his mental faculties than the opinions of witnesses. If it were possible, in the trial of such an issue, to lay before the jury the man's every act and thought, within a proper time before and after the time in question, there would be little if any propriety in admitting opinions as to his capacity, for the jury could then judge of it as well as the witness.

In this case there was no claim of insanity, or of any incapacity except weakness and imbecility from the gradual decay of his mental faculties from great age. Such decay, when it begins, is progressive and permanent; and if at one time it has reached such a stage that the man has become incapable of doing business, it would be contrary to all experience that he should recover. So, if in such case it is shown that at any time subsequent to that in question the man's faculties are so far unimpaired that he is capable of transacting business, it is evidence that they were so unimpaired at the time in question. We think, therefore, that the evidence offered that the testator, after the execution of the will, and without regard to how long after, had sufficient capacity, was admissible, and should have been received. Evidence of incapacity offered by the contestants would, in the first instance, have to be confined to a reasonable time after that in question, and would not be admissible as of a late time, except in rebuttal to the proponent's evidence of capacity at such time.

Evidence of what testator testified to before the grand jury was properly excluded. The only cases in which the testimony of a witness may be disclosed are those specified in Gen. St. 1878, c. 107, § 41. The record of the probate court,

on the application to appoint a guardian for testator, was incompetent, and was properly excluded.

Order reversed, and new trial ordered.

On appeal by appellants from the taxation of costs in this court, the following opinion was filed, October 28, 1880.

By the Court. The clerk's disallowance of the item for copy of reporter's minutes in appellants' bill of costs and disbursements is affirmed, not on the ground that the appellants are not entitled to the item, but that it is not a disbursement incurred in this court, nor in perfecting or preparing the appeal. If necessarily incurred, it should be allowed to appellants as the prevailing party in the motion for a new trial, upon the final taxation of costs in the court below.

JAMES STINSON vs. CHICAGO, ST. PAUL & MINNEAPOLIS RAILWAY COMPANY.

October 9, 1880.

Condemnation of Land—Evidence of Value—Sales of similar Land in the Vicinity.—Upon a jury trial upon a land-owner's appeal to the district court from an award of commissioners, in proceedings for the condemnation of land for railroad purposes, the appellant called a witness who testified to sales of other lands sold by him from time to time, in the vicinity of the land sought to be condemned, and also gave testimony with reference to the similarity of situation and character of the lands so sold to the land sought to be condemned. *Held*, 1. That evidence of the prices obtained for the lots so sold by the witness, and of the average price obtained for the lots so sold, was incompetent and inadmissible.

Same—Want of Similarity—Remoteness in Time.—2. That, even if such evidence could have been competent and admissible, if a proper foundation had been laid, the court, in the exercise of a sound discretion, might properly have excluded it in this case, upon the ground that no

sufficient similarity of character and situation between the land sold and those sought to be condemned had been shown, and upon the further ground of the remoteness of most of the sales from the time of the filing the commissioner's award.

Same—Value of Land for all Purposes.—3. That the proper inquiry upon the point of value is what is the value of the land (sought to be condemned) for any purpose, and not what is its value for railroad purposes.

Appeal by Stinson from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, denying his motion for a new trial after a verdict awarding him \$8,312.25—the same amount awarded him by the commissioners.

At the trial, it appearing that a bridge across a ravine would be necessary to connect Westminster avenue, as laid out on Stinson's property, with the travelled part of the same avenue, in the city of St. Paul, William Crooks, a civil engineer, called for the appellant, having testified to his qualifications as a civil engineer, and his knowledge of the locality, and having also testified that a bridge connecting these two points would not be an expensive structure, was asked, "About what, in your judgment, would be the cost of such a structure, being about 700 or 800 feet across?" The question was excluded, on respondent's objection, as immaterial and irrelevant, and the appellant excepted. The other exceptions taken are stated in the opinion.

Bigelow, Flandrau & Clark and *R. B. Galusha*, for appellant.

The best evidence of the value of a piece of land is the price that people have from time to time paid for it; not what anyone thinks it ought to sell for. The mere opinions of witnesses as to value are not entitled to much consideration. *Matter of William Street*, 19 Wend. 678; *Matter of Pearl Street*, 19 Wend. 651; *Lee v. Railroad Co.*, 13 Barb. 169. In some states opinions as to value are not admitted at all. *Rochester v. Chester*, 3 N. H. 349, 364; *Peterborough v. Jaffrey*, 6 N. H. 462; *Beard v. Kirk*, 11 N. H. 397; *Hoitt v. Moulton*, 1 Foster, (N. H.) 586.

Evidence of actual sales and leases of land similarly situated is admissible to prove value. *Davis v. Railroad Co.*, 11 Cush. 506. In *Patterson v. Boom Co.*, 3 Dillon, 468, the estimates of the witnesses as to the value of the property (an island in the Mississippi river) ranged from \$300 to \$20,000 or \$30,000, and *Dillon, J.*, instructed the jury that "if there have been sales of these islands, or of other islands similarly situated and adapted to the same uses, or contracts with land-owners by the Boom Company for the use of other lands in the vicinity for boom purposes, these may be resorted to by you, looking at all the circumstances of these sales and contracts, in the determination of the ultimate question of value; and, ordinarily, actual sales and transactions are better evidence of value than mere opinions of witnesses on the subject." This case was affirmed in the U. S. supreme court, (*Boom Co. v. Patterson*, 98 U. S. 403,) and will of course be the rule of decision in the federal courts on this point. The same rule was sanctioned in *Lehmicke v. St. Paul, S. & T. F. R. Co.*, 19 Minn. 464; and was adopted in *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305; *Paine v. Boston*, 4 Allen, 168; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115; *Boston & Worcester R. Co. v. Old Colony R. Co.*, 3 Allen, 142; *Wyman v. L. & W. R. Co.*, 13 Met. 316; *St. Louis, Alton & T. H. R. Co. v. Haller*, 82 Ill. 211; *Jones v. C. & I. R. Co.*, 68 Ill. 380; *Presbrey v. Old Colony R. Co.*, 103 Mass. 1.

The court erred in rejecting the question "What is the value of the land of the plaintiff in dispute here, for any and all purposes, including its adaptability for railroad purposes, taking into consideration that it cannot be used by the plaintiff for railroad purposes, but also taking into consideration the fact that it is adapted to railroad purposes." This is the very question framed by the court, and put to all the witnesses, in the case of *Patterson v. Boom Co.*, 3 Dillon, 468. See *Boom Co. v. Patterson*, 98 U. S. 403.

Davis, O'Brien & Wilson, for respondent.

BERRY, J. This is an appeal from an order of the district court for Ramsey county denying the appellant (Stinson's) motion for a new trial in condemnation proceedings. The report of the commissioners was filed June 25, 1879, and the trial in the district court took place in November following. The lands condemned consisted of some 70 lots and blocks in Stinson and Arlington Hills addition to St. Paul. In the district court, R. W. Johnson testified that he had had charge of Stinson's addition since it was laid out, in 1872. Had sold property in it for Stinson—20 or 30 lots. These sales were made during the last seven years. Last sale was Friday, week before last. Sold two lots in June or July, 1879, not far from the time this award was filed. They were in the immediate vicinity of this property. It was similar property (superficially considered) to that now in controversy. The ground from the south side slopes to the railroad, and there is a rise to the north side; so they are similarly situated, although, probably, a little steeper on the north side than on the south side. The sales were *bona fide*, to persons desiring to purchase, and who paid the money.

Question by appellant: "What were the prices for which that property was sold that you speak of?" Respondent's counsel objected, and questioned the witness for the purpose of forming a basis for the objection. The witness answered: "There are 77 acres in this addition—about 480 lots; sold last spring lot 11, in block 13, and lot 11, in block 11; have sold other lots in this addition in the last seven years, along at different times, from year to year; can't give the dates when, within a year before selling those two lots, I sold any others; I sold five here two or three days ago; should say that I have sold three or four within a year from June 25, 1879." Respondent's counsel then objected to the appellant's question as incompetent and immaterial, and not evidence of the value of the condemned property under the situation testified to. The court excluded the question, and appellant excepted. The witness then testified that the lots spoken of,

as having been sold by him in the immediate vicinity of this property, are of the same size and similarly situated as lots in the property in dispute; "they are similarly situated with lots opposite them on the land in dispute, though not situated exactly alike; they are both on an inclined plane; one is more inclined than the other; they are a little steeper on the side the railroad wants to condemn; I know what these 30 or 40 lots, that have been sold there, were sold for." Upon this foundation the appellant asked the witness: "What has been the average value, or the average price, for which those lots have sold?" The question was objected to as incompetent, immaterial, and irrelevant, and was excluded by the court, appellant excepting.

1. Whether these questions were properly excluded is the principal subject of inquiry in this case. We think the questions were properly excluded for several reasons. If it be admitted that evidence of the price at which property similar in character and situation to other property sought to be condemned was sold, is admissible to show the value of the latter property, as is held in some states,—notably in Massachusetts,—still, the rule is that the determination of the question whether the similarity of character and situation is sufficient, and the sale sufficiently recent to make the proposed evidence admissible, is a matter not regulated by any fixed rules, but wholly within the sound discretion of the trial court. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115; *Benham v. Dunbar*, 103 Mass. 365; *Green v. Fall River*, 113 Mass. 262; *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305. Upon the foundation laid as we have seen in this case, and upon the plat or map produced upon the trial, we think that the court below, in the exercise of sound discretion, might well have excluded the question asked, upon the ground that the requisite similarity of the property condemned to that sold was not shown to exist; and so, also, with regard to the time of the sales inquired about, the court might very properly exclude the question upon the ground that some of the

sales were so remote in time from the date of the award that the average prices inquired for could not furnish any reasonable evidence of the value of the condemned property at the time of the award, or have any effect except perhaps to mislead the jury. See cases cited, *ante*. But, irrespective of these considerations, we are of opinion that—unless, perhaps, in an exceptional case, in which no other evidence can be had—evidence of the kind sought to be elicited by the questions under consideration should be excluded on general grounds of policy and convenience.

The objections to evidence of this kind are stated in *East Pennsylvania Railroad v. Heister*, 40 Pa. St. 53, where the court, speaking of similar evidence received in that case, says: "It did not pretend to fix the market value of the land, but assumed to ascertain it by the special, and it may be exceptional, cases named. This will not do; for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated, on the other; and thus would there be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate which, in such cases, we have seen is a test of value. It would be as liable to be the result of fancy, caprice or folly as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous." See, also, *Central Pacific R. Co. v. Pearson*, 35 Cal. 247. As before said, we are of opinion that the questions were properly excluded. In *Lehmicke v. St. Paul, S. & T. F. R. Co.*, 19 Minn. 464, evidence similar to that excluded appears to

have been received, but it does not appear to have been objected to, and its admissibility was acquiesced in by counsel, and thereupon apparently assumed by the court without discussion.

2. The same witness having testified that the land proposed to be condemned had "peculiar adaptation to railroad purposes in respect to the ease with which trains can come in and go out of St. Paul with a less grade on that route than any other, and presenting one of the few places by which railroad trains can get in," the appellant then asked him this question: "What is the value of the land of the plaintiff, in dispute here, for any and all purposes, including its adaptability for railroad purposes, taking into consideration the fact that it cannot be used by the plaintiff for railroad purposes, but also taking into consideration that it is adapted to railroad purposes?" The question having been excluded, and exception taken, the appellant then asked the witness: "What, in your judgment, is the value, for railroad purposes, of the land of the plaintiff proposed to be condemned by this railroad company?" The court excluded the question, saying: "I think the question is, what is its value for any purpose?" and appellant excepted. The witness was then asked: "What is the value of the land of the plaintiff which is proposed in this proceeding to be taken by the railroad company, for any purpose for which it is adapted, considered as of the time of filing the award?" This question was allowed, and the witness answered: "I have given my answer. I answered the question in regard to its value for building purposes, and I don't think that my life has been sufficiently spent with railroads to justify me in saying what it would be worth for railroad or for any other purpose. I don't think I can answer the latter part of this question. I believe it would be more valuable for other than for building purposes, but as to the extent I do not feel competent to answer." The witness had previously testified to his estimate of the value of each of the

lots in question, and that his estimate of such "value had been without any reference to the railroads which pass through it—as building lots simply."

Whether the two excluded questions were admissible or not, it is quite apparent that the witness, according to his own testimony, was unable to answer them, and that the exclusion, therefore, worked no prejudice to the appellant. But, aside from this consideration, we are of opinion that the view taken by the court below was the correct one, viz., that the proper question was, what is the value of the property sought to be condemned for any purpose? that is to say, for any purpose for which it is adapted and is available. No reason can be given why property taken under the eminent domain by a railroad company, or for any public purpose, should be paid for at a rate exceeding its general value—that is to say, its value for any purpose. Any use for which it is available, or to which it is adapted, is an element to be taken into account in estimating its general value. But where a condemnation is sought for the purposes of a railroad, to single out from the elements of general value the value for the special purposes of such railroad, is in effect to put to a jury the question, what is the land worth to the particular railroad company, rather than what is it worth in general? The practical result would be to make the company's necessity the land-owner's opportunity to get more than the real value of his land.

3. The question addressed to the witness Crooks was properly rejected. If it had been admitted, and the answer had been favorable to the appellant, it could have had no other effect than to lead the jury away from the real question—that of value at the time of the award—into mere conjectures and speculations as to what might or might not be done, when or how, if ever, no man could tell.

These are all the points made by the appellant which appear to require special notice, and the result is that the order denying appellant's motion for a new trial is affirmed.

CHRISTOPHER CARLI *vs.* ESAIAS RHENER.

October 15, 1880.

Acts of Officer *de facto*.—A person claiming and having color of title to an office by election or appointment, and in possession thereof, exercising its functions and duties, is the officer *de facto*, and his acts as to the public and parties interested in them are valid and cannot be questioned, notwithstanding another person may be the officer *de jure*. Application of this rule to the facts of this case.

Appeal by defendant from an order of the municipal court of Stillwater, vacating and setting aside the decision and order for judgment and the judgment in his favor thereon, mentioned in the opinion.

L. E. Thompson, for appellant.

Gregory & Confort, for respondent.

BERRY, J. Norgord was and acted as the judge of the municipal court of Stillwater for the two years prior to April 7, 1880. On that day Smith, who had been duly elected as his successor, took the requisite oath of office at five minutes after 11 A. M., and we may as well assume (what we understand to be the fact, though it does not appear as it ought to,) that he immediately filed such oath in the office of the city clerk, as by law required, so that he was duly qualified. Norgord, between the hours of 11 and 12 of the same day, and after Smith had qualified, signed findings of law and fact in the case at bar, closing the same with a direction for judgment accordingly. It appears—though we do not perceive that this is important—that he (Norgord) had arrived at a determination of the case before Smith qualified; but such his determination had not then been reduced to writing. At the time of signing the findings and direction he had not been made aware that Smith had qualified. The clerk of the municipal court, upon the filing of the findings and direction on the next day, entered judgment accordingly. There is nothing to show that Smith in fact took possession of the office for which he had qualified, by exercising any of its func-

27 299
70 450

tions or duties, until after the findings and direction had been signed and handed to the attorney for the successful party to be filed with the clerk.

Upon this state of facts, we are of opinion that the judgment was valid. Norgord came into office under an election or appointment, (it does not appear which,) the regularity and validity of which are not questioned. Under color of this election or appointment he was exercising the duties of the office at the time of signing the findings and direction spoken of. Inasmuch as Smith had qualified, he was *de jure* the judge, and Norgord's term *de jure* was, under the statute, at an end. Gen. St. 1878, c. 64, § 133. But, as it in no way appears that Smith had taken possession of the office by exercising any of its duties or functions, Norgord, who was exercising its duties under the color spoken of, continued and was in possession of it. His case is, therefore, that of an officer *de facto*—a person having and claiming color of title to an office by election or appointment, and in the exercise of its functions and duties; that is to say, in possession of it. The acts of such an officer are valid as respects the public and persons interested therein, and as to them cannot be questioned. *Brown v. Lunt*, 37 Me. 423; *State v. Brown*, 12 Minn. 538; *Wilcox v. Smith*, 5 Wend. 231; *People v. Peabody*, 6 Abb. Pr. 228; *Id.* 296; *People v. Cook*, 8 N. Y. 67; *Town of Plymouth v. Painter*, 17 Conn. 585; *In re Boyle*, 9 Wis. 264. That one person in possession of an office may be the officer *de facto*, while some other person is the officer *de jure*, is of course, though it is said that there cannot be an officer *de jure* and an officer *de facto* both in possession of the same office at the same time. *Boardman v. Halliday*, 10 Paige, 223.

The act of Norgord in signing the findings and direction for judgment being valid, it was the duty of the clerk to enter the judgment accordingly, as he did. The judgment was, therefore, valid, and the court below erred in vacating and setting it and the findings and direction aside.

The order appealed from is, therefore, reversed.

WILLIAM L. HOWE vs. SOLOMON FREIDHEIM and another.

October 26, 1880.

Bond of Indemnity — Breach of Condition. — F. (plaintiff in an execution against H.) and another executed and delivered to P., an officer, in whose hands the execution had been placed, an indemnifying bond, "conditioned that if the said F. shall save the said P. harmless from any and all damages and costs occasioned to him by the levy of said execution, then this obligation to be void; otherwise, of force." H. having recovered a judgment for damages against P. on account of the levy, and taken out execution, H. and P. entered into an arrangement, the result of which was a discharge of his judgment by H., and an assignment of the bond to H. by P., each (the discharge and assignment) in consideration of the other. *Held*, that the condition of the bond is broken, and that H. may maintain an action upon it.

Appeal by plaintiff from a judgment of the district court for Rice county, where the action was tried by *Buckham, J.*, a jury being waived.

Geo. N. Baxter, for appellant.

Perkins & Whipple, for respondent.

BERRY, J. Paddleford was a policeman of the city of Northfield, with authority to levy executions issued from a justice of the peace. A justice's execution was put into his hands against Howe. Before levying the same he took an indemnifying bond executed by defendant Freidheim (the execution plaintiff) as principal, and defendant Henderson as surety, which, after reciting the placing of the execution in his hands, is conditioned "that if the said Freidheim shall save the said Paddleford harmless from any and all damages and costs occasioned to him by the levy of said execution, then this obligation to be void; otherwise, of force." Paddleford having levied the execution upon property claimed by Howe to be exempt, Howe brought an action against him, in which he (Howe) recovered judgment for an amount exceeding the penalty of the bond. Upon this judgment execution was issued against Paddleford, and thereupon an arrangement was entered into between him and Howe, the substantial result of which

was a discharge of his judgment by Howe, and an assignment of the bond to Howe by Paddleford, each (the discharge and the assignment) in consideration of the other.

The effect of this transaction is that Paddleford has paid the judgment recovered against him on account of his levy, by parting with the bond—a thing of value. To the extent of that value he has suffered and paid, in the words of the bond, “damages and costs occasioned to him by the levy of said execution.” This feature of the case clearly distinguishes it from *Weller v. Eames*, 15 Minn. 461. See *White v. French*, 15 Gray, 339. It follows that the condition of the bond is broken, and that plaintiff, as Paddleford’s assignee, has a right of action upon it.

The judgment is accordingly reversed, and the case remanded, with directions to enter judgment for the plaintiff in accordance with the views herein expressed.

SALLY DESNOYER vs. MARY JORDAN and others.

October 28, 1880.

27	206
41	260

Antenuptial Contracts.—Parties in contemplation of marriage may by contract, equitable and fairly made, fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his or her decease, and to exclude the operation of the law in respect of fixing such rights. Gen. St. 1866, c. 48, §§ 14-17, did not limit such contracts to merely barring dower.

Same—Not Impaired by Subsequent Legislation.—A subsequent statute cannot impair the obligation of an antenuptial contract, nor affect the rights of the parties as stipulated by it.

Appeal by plaintiff from a judgment of the district court for Ramsey county, *Brill, J.*, presiding, affirming a judgment of the probate court.

Oscar Stephenson, for appellant.

B. B. Gulusha and *George B. Young*, for respondent.

GILFILLAN, C. J. The appellant and Stephen Desnoyer were married in this state May 7, 1873, and he died December 3, 1877, she surviving him. His estate being in course of administration, she applied to the probate court in Ramsey county, in which the administration was pending, asking that one-third of the real and personal property might be set off to her as the widow, and as her portion of the estate, pursuant to the statute. The application was opposed by the heirs, and the probate court denied it. She appealed to the district court, and that court found as facts that "previous to their marriage, and just prior thereto, and in contemplation thereof, said parties (appellant and Stephen Desnoyer) entered into a mutual agreement in writing, executed by each of them under seal, and acknowledged before a notary public, and witnessed by two witnesses, whereby, in terms, Stephen Desnoyer, in contemplation of said marriage, and in consideration thereof, and in consideration of the services theretofore rendered to him by said Sally Johnson (appellant) as housekeeper, did grant and convey to said Sally Johnson, after his death, and for the term of her natural life, the real estate and appurtenances situate in the county of Ramsey, and state of Minnesota, described as follows, (description,) and did give and grant to her after his death, and during her life, the sum of \$500 per year out of his estate, to be paid to her in equal semi-annual instalments, and did make the same a charge upon all his estate, and did also give to her absolutely at his death a horse, a buggy, a harness, a sleigh and a cow. In consideration thereof, said Sally Johnson did, by said agreement, in terms release said Desnoyer for past services, and did release all dower and right of dower in his lands, and all her interest or claim of any kind in and to the estate and property of said Desnoyer, which might arise by reason of said marriage, except as to the provision made for her in said agreement." The court also found the agreement was not cancelled or abrogated. The agreement was not recorded. The land described in it was owned and occupied as a resi-

dence by Desnoyer at the time of making the agreement and of his death, and was parcel of a tract owned by him of about 300 acres. The contract was not produced on the trial, but the evidence as to its execution and contents was fully sufficient to sustain the finding of the court below. Indeed, it is difficult to see how the court could have found otherwise. And there is little, if any, evidence tending to show that it was afterwards cancelled.

The question of appellant's homestead right (if it were to be conceded that it is not disposed of by this antenuptial agreement) cannot be considered; for, in her petition on which this proceeding is based, she expressly disclaims any intention to claim such right, and the evidence is not such as to identify any homestead beyond that described in the agreement.

The agreement contemplated that, except as provided in the agreement itself, the appellant should be excluded from any right or interest in Desnoyer's estate that might otherwise accrue to her by reason of the marriage about to take place between the parties. In the absence of a valid agreement between the parties, the law fixes the rights which either the husband or the wife shall have in the property of the other, both during life and after the death of either. But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitable and fairly made between them, and to exclude the operation of the law in respect to fixing such rights; so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights. That such antenuptial agreements might be made was recognized in the statute in force when this agreement was made. Gen. St. (1866) c. 69, §§ 1, 4; c. 48, §§ 14-17. The latter of these statutes did not limit (as appellant argues) antenuptial contracts to barring dower alone. It only prescribed what sort of provision for the wife, in any such contract, should have the effect to bar dower; that it must be a jointure of a freehold estate in lands for her life,

at least, to take effect in possession or profit immediately on the death of the husband, or a pecuniary provision for her benefit in lieu of dower; such jointure or pecuniary provision to be assented to by her before the marriage. But it did not disable the parties to make an antenuptial contract which should, in any other respect, fix the rights of the parties in the property of each other.

The parties having made their contract, and it being one which they were competent to make, and there being nothing to impeach its fairness or equitable character, and it clearly providing that the wife shall have no right or interest in the estate of the husband other than that provided in the contract, this would seem to dispose of the case. But it is claimed that subsequent acts of the legislature confer on the wife, surviving her husband, rights in his estate which obtain, notwithstanding the antenuptial contract stipulates she shall have none other than it provides for. At the time this contract was made, a widow was entitled to dower in the real estate of her deceased husband, (unless barred, as in the statute provided,) and in case of intestacy to certain allowances out of, and to the same distributive share of, his personal estate as a child of the intestate would have. Afterwards dower was abolished, and in 1876 the legislature passed an act (Laws 1876, c. 37; Gen. St. 1878, c. 46, §§ 2, 3,) which entitles the surviving husband or wife to a life estate in the homestead of the deceased, free from all claims on account of debts of deceased, and also absolutely to one-third of the real estate of which the deceased was seized during coverture, subject in its just proportion with the other real estate to such debts of deceased as are not paid out of the personal estate.

Unless the operation of this statute is prevented by the antenuptial contract, the appellant is entitled, as to the real estate at any rate, to what she claims. But, inasmuch as the contract excludes all such rights as the statute assumes to give, the latter can have no effect without overriding the

the former; that is, without impairing its obligation. Now, though the contract of marriage and its incidents, including rights of property depending on it, while such rights of property remain inchoate and are mere expectancies, may be within the power of the legislature to vary or affect by subsequent legislation, it is not so with an antenuptial contract. Such a contract is founded on a high consideration. Rights under it are contract rights as much as any can be, not merely resting upon or incident to the relation of husband and wife. They are independent of such incidents. Such a contract is under the constitutional protection as much as any contract. So, even if the legislature intended, by the statute last cited, or by that in 1876, regulating distribution of personal estate of a deceased person, (Laws 1876, c. 42; Gen. St. 1878, c. 51, § 1,) to give rights contrary to the provisions of antenuptial contracts then existing, the statute would, to that extent, by reason of the constitutional inhibition against laws impairing the obligation of contracts, be inoperative; but we do not think the legislature intended to affect such contracts in any way.

Judgment affirmed.

ADA M. PICKETT vs. RUFUS S. PICKETT.

October 28, 1880.

"Adultery" defined.—In the statute regulating divorce, the word "adultery" includes illicit intercourse by a husband with an unmarried woman.

Appeal by plaintiff from a judgment of the district court for Redwood county, Cox, J., presiding. The defendant did not answer the complaint, nor make any appearance in the district court or in this court.

Frank L. Morrill, for appellant.

GILFILLAN, C. J. Action by a wife for divorce, on the ground of adultery by the husband. As to the fact of adultery the court below found that, after the marriage, the defendant had carnal intercourse with an unmarried woman, but decided that such carnal intercourse was not adultery within the meaning of the statute regulating divorce, holding that statute to use the word "adultery" in the restricted sense in which it is used in the statute making adultery a criminal offence, and not in the more enlarged sense in which it is commonly used.

In some of the states, our own included, it is held that to constitute adultery within the statute punishing it as a crime the act must be with a married woman. In defining the term within the meaning of statutes regulating divorce, the text writers say that, the party charged with adultery being married, it is immaterial that the *particeps criminis* is single. 1 Bishop on Mar. & Div., § 703; Reeve's Dom. Rel. 207. And this court, in *State v. Armstrong*, 4 Minn. 251, (335,) while holding that to make it a statutory crime the sexual act must be committed with a married woman, states that, "when regarded in a civil light, as a violation of the marriage contract, no distinction is made between an illicit connection by a married man with a married or an unmarried woman. In either case, for the purpose of a divorce, he is guilty of adultery."

There may be reason for giving the word a restricted meaning in the statute punishing the act as a crime, and which treats the act as one affecting the peace and good order of society, while the popular and more enlarged meaning is intended in the statute prescribing causes for divorce, where the act is treated as one affecting the rights of husband and wife. All the prescribed causes for divorce are violations of the marriage contract, or neglect of or inability to perform its obligations. Adultery is specified because it is a violation, the greatest there can be, of the contract. Sexual intercourse by the husband with an unmarried woman is as much a violation of the contract and of the rights of the wife as it would

be if committed with a married woman. The word "adultery," in its popular sense, would include this violation of the contract, whether committed with a married or unmarried woman. There is no reason, then, for giving it a more restricted meaning.

Judgment reversed, and court below directed to enter judgment according to prayer of complaint.

A. L. PORTER *vs.* MARTIN S. CHANDLER.

October 28, 1880.

Contract to carry on Farm on Shares.—A certain contract to till and carry on a farm, the compensation for tilling and carrying it on to be paid in one-half of the grain raised on the farm, all grain, corn, straw, grass, hay, and all other crops to belong to the owner of the farm, construed to be a contract of hiring, and not to make the party hired a part-owner of the crops.

Replevin—Defendant not in Possession.—In an action of replevin, where the court, without objection or exception on the part of defendant, instructs the jury to find for plaintiff for the value of the property, the defendant, unless the objection was made at some other stage of the trial, cannot afterwards be heard to claim that the action cannot be maintained because the property was not in defendant's possession when it was commenced.

Evidence of Value of Grain.—Upon an issue as to the value of grain on a farm it is proper to prove what was the usual and proper market for the grain.

Appeal by defendant from an order of the district court for Goodhue county, Crosby, J., presiding, refusing a new trial. *J. H. Case*, for appellant.

Edgerton & Edgerton, for respondent.

GILFILLAN, C. J. Replevin to recover 444 bushels of wheat. The wheat was grown on a farm belonging to plaintiff, under a contract between him and Henry and A. Linnemann, by which, in substance, he hired and employed them to till and

27	301
57	446
27	301
68	399
27	301
74	132
27	301
79	156
79	157
79	158
79	160
79	161
79	162
79	163

carry on the farm from January 2, 1877, to November 2, 1877, at their own cost and expense; to sow 80 acres in wheat, 10 acres in oats, and 10 acres in corn; to harvest, thresh and clean the grain in good order for market, and before October 15th to place it in bins and places designated by him on the farm, all the work to be done under his orders and directions. In compensation for which he agreed to allow them, at the end of the term, one-half of all the grain raised, excepting and deducting therefrom all claims for advances by him, and all other claims due and demands he might have against them at the end of the time; all the grain, corn, straw, grass, hay, and all other crops, to belong to him. The wheat in controversy was part of that raised under this arrangement, and had not been separated and set apart as the property of the Linnemanns when it was levied upon and taken by defendant, sheriff of the county, under execution against them.

It is clear that the contract is just what it purports to be, a contract of hiring, and the exclusive property in the crops was in plaintiff until he should set apart for the Linnemanns the amount they might be entitled to in payment of the balance due them at the end of the time specified. The several requests of defendant for instructions to the jury were all based on a wrong theory of this contract, the first assuming it to be a chattel mortgage, and the second and third that it constituted the Linnemanns part-owners in the wheat. The requests were all properly refused.

The court then instructed the jury to return a verdict for plaintiff for the value at the time and place of the taking of the wheat in controversy, it appearing from the answer and the evidence that defendant had sold it before action brought. To this instruction there was no exception, and the jury found as instructed. Had defendant desired to make the objection that the action, being in replevin, cannot be maintained for recovery of the value of the property because the defendant was not in possession of the property when it was brought, he should have made it by exception to this instruc-

tion. By not making it then he waived it, admitted that the instruction was correct, except for the propositions contained in his requests.

Neither of the Linnemanns was agent for plaintiff in such sense as to make his declarations in respect to anything involved in this action evidence against the plaintiff. The conversation between one of them and defendant was, therefore, properly excluded.

It was correct for the court to allow proof of where was the usual and proper market for the wheat in suit. If such usual and proper market was at a distance, the value of the wheat where taken would be controlled by the value at such market, and the cost of transporting there.

Order affirmed.

27 303
62 314

ROBERT DEAKIN *vs.* CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY.

November 9, 1880.

Error in Refusal to Dismiss cured by Subsequent Evidence.—*Berkey v. Judd*, 22 Minn. 287, followed, as to the point that an error committed in the denial of a motion to dismiss an action on the ground of insufficiency of testimony is cured by the after introduction of competent evidence sufficient to supply the deficiency.

Evidence *held* sufficient to support a verdict.

Appeal by defendant from an order of the district court for Goodhue county, *Crosby, J.*, presiding, refusing a new trial. The action was brought to recover damages for the killing of two mares of plaintiff by a train on defendant's railway, and the only question submitted by the court to the jury was whether the defendant's servants in charge of the train, after they discovered the peril of the mares, used reasonable care to avoid injuring them.

Seagrave Smith, for appellant.

J. C. McClure, for respondent.

BERRY, J. We need not inquire whether, at the close of his testimony in chief, the plaintiff had or had not introduced evidence sufficient to establish his alleged cause of action. If he had not, any error of the court in refusing to grant defendant's motion to dismiss was cured; if, in the after progress of the trial, competent evidence was received sufficient to supply the deficiency. *Berkey v. Judd*, 22 Minn. 287.

The simple question remains whether the evidence in the case was sufficient to support the verdict. Upon a careful study of the testimony, we have come to the conclusion that it has a sufficient tendency to establish plaintiff's alleged cause of action in all material points, and that therefore the verdict should not be disturbed.

Order denying new trial affirmed.

27	304
40	383
27	304
68	168
68	304

SHERMAN P. TERRYLL vs. SAMUEL E. BAILEY.

November 9, 1860.

Appeal from Justice—Effect of Judgment of Reversal.—Upon an appeal from the judgment of a justice of the peace to the district court upon questions of law alone, a simple judgment of reversal has the effect of a dismissal of the action. It annuls the proceedings before the justice, and leaves the parties to proceed *de novo*.

Same—Effect of such Judgment in Replevin as a Bar to a Subsequent Action of Replevin.—In replevin, where the property has been delivered to plaintiff, if upon appeal on questions of law alone the district court reverses the judgment of the justice, without deciding the merits of the action, the defendant is entitled, as upon dismissal, to judgment for a return of the property, and if it cannot be had, for its value. An answer alleging, as a bar to an action in replevin, the recovery of judgment by plaintiff against defendant before a justice of the peace, in replevin for the same property, an appeal by defendant to the district court on questions of law alone, and the judgment of the district court reversing the judgment of the justice and adjudging a return of the property to defendant, and the recovery by him of its value, if a return cannot be had, does not show a bar unless it allege or show that the judgment of the district court was rendered on the merits. That judgment alone does not show it.

Appeal by plaintiff from an order of the district court for Redwood county, *Cox, J.*, presiding, overruling a demurrer to the answer.

Baldwin, Miller & Morrill, for appellant.

Alfred Wallin, for respondent.

GILFILLAN, C. J. Action in replevin. As a bar to the action the answer alleged that an action for the same cause by this plaintiff against this defendant was commenced before a justice of the peace; that judgment therein was rendered on the merits by the justice in favor of plaintiff, awarding the property to him; that defendant appealed from the judgment to the district court on questions of law alone; that in the district court judgment was rendered reversing the judgment of the justice, and adjudging "that said property in said judgment mentioned and described be returned to the defendant, and, in case said property cannot be obtained, that the defendant recover from the plaintiff the sum of \$90, which said sum of \$90 is the value of said property, as appears by the affidavit filed in said action before said justice of the peace, and as further appears by the allegations in plaintiff's complaint and admissions in defendant's answer in said action." As alleged in the answer, the order on which this judgment was rendered merely "ordered and decided that said judgment rendered by said justice of the peace should be reversed, with costs." The answer does not allege that the judgment of the district court was rendered on the merits, nor does it appear whether it was rendered on the merits or for error not involving the merits, otherwise than may be inferred from the order for judgment. Plaintiff demurred to this defence, and the court below overruled the demurrer.

If the judgment was not rendered on the merits, but on some technical point, of course it can be no bar to the litigation of the merits in a subsequent action. And as the judgment of reversal may have been rendered on either ground, it was necessary that, to make it a bar, the answer should:

allege or show that it determined the merits of the action. *Vaughan v. O'Brien*, 57 Barb. 491. It is not enough that it adjudges a return of the property to defendant, or the recovery of its value in case a return cannot be had. The defendant was entitled to that judgment upon a reversal for any cause. In an action in replevin before a justice, the property, if it can be reached by the writ, is taken and delivered to the plaintiff. Gen. St. 1878, c. 65, § 91. Upon a judgment of dismissal, as well as on the merits for defendant, the defendant is entitled to a judgment for a return of the property, or for its value if a return cannot be had, with damages for the detention. Gen. St. 1878, c. 65, §§ 95, 96. Upon an appeal from the judgment of a justice to the district court on questions of law alone, the district court may affirm, or reverse, or modify, and in case of reversal it may, in a proper case, determine the merits, and render judgment thereon for the appellant. The statute makes no provision for remanding a cause to the justice and ordering a retrial, in case of reversal, where the appellate court does not render judgment on the merits. A simple reversal, not determining the merits, has the same effect as a judgment of dismissal. It annuls all the proceedings before the justice, and leaves the parties to proceed *de novo*, as though no action had been commenced; and in rendering such a judgment the court may and ought to restore the parties to the situation they were in before the action was commenced. Upon such a reversal, in an action in replevin, the right of defendant to a return of the property, if it has been delivered to plaintiff, or for its value, if a return cannot be had, follows of course.

The fact, then, that in such action the judgment of reversal adjudges a return of the property to the defendant, or its value if a return cannot be had, does not of itself show that the merits of the action are determined by the judgment. In this case the order for judgment does not in any way control the judgment, but it may be resorted to for the purpose of ascertaining whether the judgment was rendered on the mer-

its. Resorting to it for this purpose, it appears that the court did not assume to determine the controversy between the parties. It ordered merely a simple judgment of reversal and for costs; and by such judgment the defendant was entitled to have the property returned or its value. The answer fails to show the judgment to be a bar, and the demurrer should have been sustained.

Order reversed.

JOHN MCPHEE vs. ISAAC STAPLES.

November 9, 1880.

Evidence held sufficient to sustain finding of fact.

Appeal by defendant from an order of the municipal court of Stillwater, refusing a new trial. The action was for damages for converting certain wheat, the property of plaintiff.

J. N. & I. W. Castle, for appellant.

L. E. Thompson, for respondent.

GILFILLAN, C. J. We do not see but there is evidence sufficient to sustain the finding of the court below as to the plaintiff's ownership of the wheat, that it came into defendant's possession without authority of plaintiff, and that he converted it to his own use. There is no other point made in the case that need be specially noticed.

Order affirmed.

FREDERICK BOETCHER *vs.* CHARLES STAPLES.

November 9, 1880.

Exemplary Damages.—The rule allowing exemplary or punitive damages applies as well to cases where the wrongful acts of defendant are within the law for the punishment of crimes, as to those where they are not.

Appeal by defendant from an order of the district court for Washington county, *Crosby, J.*, presiding, refusing a new trial. The action was for damages for an aggravated assault and battery. The defendant excepted to an instruction that the jury, if they found that the assault and battery was wilful and malicious, were at liberty to allow exemplary or punitive damages, or not, as they saw fit; and that these could be allowed in addition to the real damages which the plaintiff has sustained. The jury found a verdict of \$3,000 for plaintiff.

J. N. & I. W. Castle, for appellant, cited 2 Greenl. Ev. § 253; Field on Damages, § 28, note, §§ 73–77; *Fay v. Parker*, 53 N. H. 342; *Austin v. Wilson*, 4 Cush. 273, opinion of Metcalf, J.

McCluer & Marsh, for respondent.

GILFILLAN, C. J. It is fully settled by the decisions of this court that in actions for torts, where there has been fraud, malice or oppression on the part of the defendant, the jury may allow what are denominated exemplary or punitive damages—that is, damages beyond the mere pecuniary loss or injury to the plaintiff, and intended as in some measure a punishment upon the defendant for the wrong done, and as an example to deter others from similar acts. *Lynd v. Pickett*, 7 Minn. 128, (184;); *Fox v. Stevens*, 13 Minn. 272; *Seeman v. Feeney* 19 Minn. 79; *McCarthy v. Niskern*, 22 Minn. 90.

The rule, according to the great mass of authorities, applies as well where the wrongful acts of the defendant bring him within the law for punishing crimes, as where they are less aggravated in their character. The rule is so well estab-

lished that, whatever may be the abstract reasons for or against it, it must be adhered to till changed by the legislature.

Order affirmed.

STATE OF MINNESOTA *vs.* ALBERT R. RUHNKE.

November 9, 1880.

27	309
88	488
27	309
86	436

Indictment for Selling Mortgaged Chattels with Intent to Defraud.—The intent to defraud mentioned in Gen. St. 1878, c. 39, § 14, is an intent to defraud the mortgagees therein named. Such intent is an essential ingredient of the offence defined by that section, so that an indictment under it, alleging no intent to defraud except one to defraud some other person than the mortgagee, is fatally defective. Such defect is not reached by Gen. St. 1878, c. 96, § 10, or by c. 108, § 8.

The defendant was tried and convicted in the district court for Scott county, *Macdonald*, J., presiding, on the following indictment: "Albert R. Ruhnke is accused by the grand jury of the county of Scott and state of Minnesota, by this indictment, of the crime of having fraudulently sold and transferred mortgaged personal property with intent to defraud, committed as follows, to wit: That on the 31st day of October, A. D. 1879, the above-named Albert R. Ruhnke did, in the city of Rochester, in the state of Minnesota, convey by mortgage unto one M. W. Cook the following personal property, to wit, one bay mare, eight years old, then and there being, which said mortgage was then and there and all the time thereafter until the 20th day of January, 1880, a lien upon said personal property, the said bay mare aforesaid. That thereafter, at Blakely, in the county of Scott and state of Minnesota, on the 12th day of January, 1880, and while the said mortgage was so a lien upon said personal property, the said bay mare aforesaid, the said Albert R. Ruhnke did wilfully, maliciously, and with intent to defraud one Michael O'Neil,

sell and transfer to said Michael O'Neil the said bay mare aforesaid, then and there of the value of \$125, without the written consent of the said M. W. Cook, the mortgagee of said personal property, to so sell and transfer the said bay mare aforesaid: contrary to the statute," etc. A motion in arrest of judgment was denied and sentence was passed on the defendant, from which judgment he appeals.

Thomas F. Taylor, for appellant.

Chas. M. Start, Attorney General, for the State.

BERRY, J. Gen. St. 1878, c. 39, § 14, is: "That if any person, having conveyed any article of personal property by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, take, drive or carry away, or in any way or manner dispose of said property or any part thereof, with intent to defraud, or cause or suffer the same to be done without the written consent of the mortgagee of said property, he shall be deemed guilty of misdemeanor, and shall be liable to indictment," etc. No construction of this section is entirely free from difficulty; but that which presents the least difficulty, and, therefore, appears to us most reasonable, makes the words "the same" include both the acts and intent before mentioned. With this construction the section reads that if any person shall do the acts mentioned with intent to defraud, or shall cause or suffer such acts to be done with like intent, without the written consent of the mortgagee in doing the acts, or causing or suffering them to be done, as the case may be, he shall be deemed guilty, etc. If we are right, it follows that the intent to defraud mentioned must be an intent to defraud the mortgagee. If an intent to defraud any other person were meant, it is inconceivable that its criminality should be made to depend upon the consent of a person not injuriously affected by it. Whether an assignee of the mortgagee would not be a mortgagee within the meaning of the statute is a question not presented by this case.

The view which we take of the section under consideration

is in harmony with what is generally understood to have been the purpose of its enactment; namely, the protection of chattel mortgagees. In the case at bar the only intent to defraud alleged in the indictment is an intent to defraud, not the mortgagee or any assignee of him, but one O'Neil, to whom the mortgagor is alleged to have sold the mortgaged property. From what we have before said it is evident that, the intent to defraud the mortgagee being an indispensable ingredient of the offence, the indictment is fatally defective. O'Neil's name cannot be rejected or disregarded as surplusage, for it is descriptive of the identity of an essential element of the offence. 1 Greenl. Ev. § 65. The intent charged is an intent to defraud O'Neil and no other person.

The attorney general cites Gen. St. 1878, c. 96, § 10, and c. 108, § 8. Section 10 enacts that "in any case where the intent to defraud is necessary to constitute the offence of forgery, or any other offence that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded."

We are not called upon to consider what would have been the effect of this section, if this indictment had simply alleged an intent to defraud. This indictment has gone further, and described the offence by naming the person defrauded, and for this it is bad for reasons before assigned. Section 8, chapter 108, provides that "when the offence involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." This section is not applicable to this indictment. The allegation as to O'Neil does not appear to be erroneous. On the contrary, it appears, from the evidence, to be true. The defect of the indictment is not an erroneous allegation as to the person injured, but a total want of any other allegation of an intent to defraud, except that of an intent to defraud O'Neil.

The intent to defraud the mortgagee is an essential ingredient of the offence. Without such intent there is no criminal act, so that, without its allegation, no criminal offence is described with sufficient certainty to identify it. If the case of *State v. Boylson*, 3 Minn. 325 (438,) is against this view of section 8, we can only say that, in our opinion, it cannot be sustained.

Judgment reversed.

JESSE SUMNER and another vs. WILLIAM E. JONES.

November 11, 1880.

Credibility of Testimony.—Application of the rule that the credibility of testimony is matter peculiarly for the jury.

Action to Enforce Mechanic's Lien.—An action under Gen. St. 1878, c. 90, § 8, for the enforcement of a lien for materials furnished for the construction of a dwelling-house, is not an action for the recovery of money only; neither is it made such to any extent by the fact that the defendant in his answer sets up matter (controverted in the reply) showing not only that plaintiffs have no cause of action, but that they are thereupon indebted to him in a balance for which he prays judgment. On the trial of such action, therefore, the plaintiff is not, as a matter of right, entitled to a jury trial; but, under Gen. St. 1878, c. 66, § 217, the action is triable by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury.

Appeal by plaintiffs from a judgment of the district court for Rice county, *Buckham, J.*, presiding, and from an order refusing a new trial. The action was brought to enforce a lien for lumber to the amount of \$96.34, furnished by plaintiffs to defendant for use, and used by him, in building a dwelling-house. The defence was that by reason of an agreement for a five per cent. discount on a large quantity of lumber bought by defendant of plaintiffs, and which discount the plaintiffs agreed to allow on final settlement, but which they

then refused to allow, the defendant has overpaid the plaintiffs in the sum of \$158.23, being \$62.23 over and above the \$96.34 claimed in the complaint. The issue as to the agreement for and the rate of discount was submitted to a jury, who found in favor of the defendant. The other issues were tried by the court, which found that the discount had not been allowed, and that defendant had overpaid plaintiffs for the lumber furnished by them, including that mentioned in the complaint, in the sum of \$58.03, and ordered judgment that there is nothing due or owing from defendant to plaintiffs, and that defendant recover his costs. A new trial was refused, and judgment entered pursuant to the order.

J. H. Case and H. S. Gipson, for appellants.

A. D. Keyes, for respondent.

BERRY, J. The principal contention of the plaintiffs upon these appeals is, in effect, that the findings of the jury are not supported by the evidence. The claim is not that there was no testimony going to support them, but that it was false, as appears from other testimony. If anything can be regarded as settled in the law, it is that the credibility of testimony is peculiarly for a jury. As a general rule, their decision upon this is final. There may be cases in which the verdict of a jury will be set aside, because the evidence upon which it rests has no reasonable tendency to support it; but this would not be in a case like this at bar, in which there is simply a conflict of evidence, upon which a pure question of credibility is presented to the jury. Upon these appeals, we see no reason whatever for departing from the general rule mentioned above. This disposes of the positions taken by the plaintiffs as to the alleged agreement for five per cent. discount from the lumber furnished by them to defendant, and as to the effect, by way of accord and satisfaction, of the transaction of June 19th. The effect of that transaction was to be determined upon a consideration of its surroundings. As to these the testimony was conflicting, so that the question presented was not one of law, upon an admitted or uncontroverted state of facts,

but a question of fact, as to whether any accord and satisfaction, or full settlement of the matters between the parties, was intended and effected or not. Obviously, the receipt put in evidence did not necessarily establish the accord and satisfaction contended for.

This is an action under Gen. St. 1878, c. 90, § 8, for the foreclosure of plaintiffs' lien for materials furnished by them to defendant for the construction of a dwelling-house. It is not, therefore, an action for the recovery of money only; nor is it made such, to any extent, by the fact that defendant, in his answer, sets up matter (controverted in the reply) showing not only that the plaintiffs have no cause of action, but that they are thereupon indebted to him in a balance for which he prays judgment.

Not being an action for the recovery of money only, the plaintiffs were not, as a matter of right, entitled to a jury trial, but, as provided in Gen. St. 1878, c. 66, § 217, the case was triable "by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact involved therein be tried by a jury." It appears from a recital in the judgment, as well as from one in the finding of the trial court, that three specific questions of fact were submitted to the jury by consent of parties. To this submission no objection appears to have been made by anybody. The issues not thus submitted to the jury were tried by and found upon by the court. This is just such a course of procedure as is provided for in section 217, above cited, and is unquestionably proper. But even if the plaintiffs, as they insist, did not consent to the submission of the three questions to the jury, the result would be the same, for the case would then be one in which the submission was ordered by the court without the consent of the parties, and this also is authorized by section 217.

This disposes of the appeals, and the judgment and order refusing a new trial are accordingly affirmed.

STATE OF MINNESOTA vs. FREDERICK C. RIEBE.

November 12, 1880.

27	315
39	359
27	315
67	183
27	315
80	253

Forgery—Constituents of Offence—Accountable Receipt for Money.—To constitute the crime of forgery, under Gen. St. 1878, c. 96, § 1, by altering any of the instruments therein mentioned, the alteration must be such as to alter the legal effect of the instrument. A mere verbal alteration, not affecting the obligation of the instrument, is not enough. An accountable receipt under that section is an instrument acknowledging the receipt of money or personal property, coupled with an obligation to account for or pay or deliver the whole or some part of it to some person. An indictment for altering an accountable receipt for money, so as to give it the form of a promissory note, is not good unless it state or show what the obligation of the receipt was, so that it may appear that the legal effect of it has been changed by the alteration.

Appeal by defendant from an order of the district court for McLeod county, *Macdonald*, J., presiding, refusing a new trial.

M. O. Little, for appellant.

Chas. M. Start, Attorney General, for the state.

The indictment shows that the alterations were material, for it shows that an acquittance or receipt was changed into a promissory note whereby the maker of the original instrument is made to promise to pay to the defendant, who was not a party to it, the sum of \$100. The indictment shows a sufficient excuse for not setting out more fully the receipt that was altered, viz., that it had been destroyed by the defendant. 2 Bishop Cr. Proc. § 360; 2 Archbold Cr. Pr. 808; Gen. St. 1878, c. 108, § 15.

The indictment shows on its face that the instrument altered, as well as the one forged, is the subject of forgery. An acquittance or receipt (they are the same in criminal proceedings, *State v. Shelters*, 51 Vt. 102,) was altered, and a promissory note forged.

The proper construction to be given to the indictment is to treat it as charging the defendant with forging a promissory note, not altering an accountable receipt.

GILFILLAN, C. J. The indictment is as follows:

"Frederick C. Riebe is accused by the grand jury of the county of McLeod, and state of Minnesota, by this indictment, of the crime of forgery, committed as follows, to wit: That on the 17th day of August, 1879, the said Frederick C. Riebe had in his possession an accountable written receipt for money, showing the receipt by one Gotlieb Kopp from one Mrs. Nelly Seymour of the sum of \$740 on the 16th day of August, 1879, which said receipt has been destroyed by the act and procurement of said defendant, and a more particular description of which is unknown to the grand jury, which said receipt was signed in writing by said Gotlieb Kopp, with the name of said Gotlieb Kopp; that on the 17th day of August, 1879, in the village of Glencoe, in said county of McLeod, and state of Minnesota, and while the said Frederick C. Riebe so had the said receipt in his possession, he, the said Frederick C. Riebe, did wilfully, maliciously and falsely, with intent to injure and defraud the said Gotlieb Kopp, at the time and place aforesaid, and with the intent aforesaid, falsely alter said accountable receipt, so that, when the same was so altered, it was of the tenor and import and words and figures following, to wit:

" '\$100.

HECTOR, August 16, 1879.

" 'Ten days after date, for value received, I promise to pay to order of F. C. Riebe one hundred dollars, with interest until paid at the rate of ten per cent.

" 'GOTLIEB KOPP.'

—contrary to the statute," etc.

The statute (Gen. St. 1878, c. 96, §1,) reads: "Whoever falsely makes, alters, forges or counterfeits any * * * promissory note, or any order, acquittance or discharge for money or other property, * * * or any accountable receipt for money, goods or other property, with intent to injure or defraud any person, shall be punished," etc. It is evident from the statute that the mere verbal alteration of one of the

instruments mentioned is not made a crime. There must be the intent to injure or defraud some person. And the alteration must be such as is capable of defrauding. An immaterial alteration—a change in the phraseology not affecting the sense, nor altering the legal effect of the instrument, but leaving it in substance and effect the same as before the alteration—is not made a crime.

The indictment must show wherein the instrument charged to have been altered was changed in matter of substance and legal effect, and that the change was such as might injure or defraud. In this case the alteration was of an accountable receipt for money. An accountable receipt, within the meaning of this statute, is a written acknowledgment of the receipt, by the maker of it, of money or other personal property, coupled with a promise or obligation to account for or pay to some person the whole or some part thereof. Such receipt for money may be in legal effect, though not in form, a promissory note. The defect in this indictment consists in its not stating or showing the extent of the obligation of the accountable receipt. It does not state nor show how much of the money received was to be accounted for, nor to whom nor when nor how it was to be accounted for or paid. For aught that appears, the obligation of the original instrument was precisely the same as is expressed by the instrument after the alteration. It does not appear but that the alteration was immaterial—one merely of phraseology, not touching the substance or legal effect of the instrument. The indictment does not state facts enough to show an offence.

Order reversed.

STATE OF MINNESOTA *vs.* WILLIAM FUNK.

November 12, 1880.

Intoxicating Liquor—Vote of Town against License—Indictment for Selling.—

After a town has voted against license, pursuant to Gen. St. 1878, c. 16, § 1, an indictment may be found under section 4 against one who sells in the town without license. The vote of the town does not affect the offence described by that section.

Same—U. S. Internal Revenue Receipt not a Defence.—A receipt of the United States internal revenue collector, for the tax on the business of retail liquor dealers, is no license or authority to sell liquor, and is no defence to an indictment under the law of the state for selling without license.

Defendant was tried and convicted in the district court for Hennepin county, before *Young, J.*, on an indictment charging him with selling liquor without a license, at the town of Minneapolis in that county. A motion for a new trial was denied, sentence was passed, and the defendant appealed. At the trial the defendant offered to prove that prior to the date of the sale alleged in the indictment, the town had voted against license, and also offered in evidence a receipt of the United States internal revenue collector of the proper district for the special tax paid by defendant as a retail liquor dealer. In each instance the evidence offered was excluded, and the defendant duly excepted.

Wilson & Lawrence, for appellant.

Chas. M. Start, Attorney General, for the State.

GILFILLAN, C. J. Gen. St. 1878, c. 16, § 1, empowers boards of county commissioners to grant licenses to sell spirituous, vinous, or fermented and malt liquors, with the proviso that if the people of any municipal township shall, on the question being submitted to them as therein authorized, vote against license, then the board of county commissioners shall grant no license in said township. Section 4 makes the selling of liquors, spirituous, vinous, fermented or malt, in less quantity than five gallons, without license ob-

tained agreeably to the provisions of the chapter, a misdemeanor, and prescribes the punishment. Whether a town votes for or against license, or not at all on the subject, the offence, when one who has no license sells, must be just as it is described in section 4—that of selling without a license. The statute describes no other offence. The fact that a town has voted against license does not affect the character of the offence; it is no constituent of it. The sale and want of license constitute the crime. Why the seller did not obtain a license, or why the commissioners would not grant one,—and that is all that proof of a vote by the town against license would show,—is immaterial. *State v. Cron*, 23 Minn. 140.

The decision in the case of *State v. Hanley*, 25 Minn. 429, cited in support of the proposition that in this case the indictment should have been for selling after the town had voted against license, and the offence should have been described in the indictment as a selling after such vote, was upon a special statute, relating only to the village of Kasson. That statute provided that any person who should, in that village, sell for other than medicinal purposes, after the village should have voted against license, should be deemed guilty of a misdemeanor; and this court held that after a vote against license by the village of Kasson, the liability of one selling in that town thereafter was under that statute, and not under the general law. The decision has no application to this case. The indictment alleging a sale by defendant, and that he was not then and there a person licensed to sell, was sufficient, and proof that the town had voted against license would not have affected the case.

The receipt to defendant of the United States internal revenue collector, for the tax on the defendant's business of retail liquor dealer, could not authorize a sale by defendant contrary to the laws of the state. The law of the United States, imposing a tax upon dealers in liquors, is not, like the laws of the state regulating the selling of liquors, a police regula-

tion, but simply a tax law, enacted not to license or authorize or regulate the sale of liquors, but to raise revenue by a tax on those who are in the business of selling.

Order and judgment affirmed.

STURK J. GJERNES *vs.* JOHN A. MATHEWS, impleaded, etc.

November 16, 1880.

Innocent Mortgagee of Fraudulent Grantee—Purchase of Outstanding Paramount Title.—A person who has innocently and in good faith taken a mortgage upon real property from one holding the legal title under a conveyance which is fraudulent and void as to the creditors of the grantor, upon acquiring subsequent knowledge of the fraud, may lawfully buy in an outstanding paramount title, not affected thereby, for his own benefit.

Contract—Conditions Precedent.—When a right sought to be asserted under a contract is dependent upon the prior performance of conditions precedent, such performance must be shown to entitle a party to enforce the right.

Plaintiffs, as creditors of T. G. Fladeland, brought this action in the district court for Fillmore county, against T. G. Fladeland, John G. Fladeland and John A. Mathews, to set aside, as fraudulent as against the plaintiffs, a conveyance from T. G. to John G. Fladeland, to have a certain mortgage of the same land by John G. Fladeland to Mathews declared to have the force and effect of a mortgage from T. G. Fladeland to Mathews, and not otherwise; to have Mathews, as holder of a title to the same premises derived under foreclosure of a mortgage to one Marsh, decreed to hold such title in trust for plaintiffs, and to account for and pay over to plaintiffs, as creditors of T. G. Fladeland, the proceeds of a sale of the land made by Mathews to one Hagan, and for general relief. The defendant Mathews answered the complaint, and the action was tried by a referee, whose findings of fact were, in substance, as follows.

The plaintiffs Gjerness, Hanson and Iverson severally recovered judgments in the district court for Fillmore county, in August, 1874, on debts accruing prior to April 12, 1873, and on October 15, 1874, an execution on each of the judgments was returned unsatisfied. On September 11, 1877, Iverson assigned his judgment to the plaintiffs C. H. and L. J. McCormick, as collateral security for a debt due from him to them.

On April 21, 1872, the defendant T. G. Fladeland purchased of one Marsh certain land in Fillmore county, described in the complaint, receiving therefor a conveyance in fee, and executing to Marsh a purchase-money mortgage for \$930.23, (which should have been for \$840, only,) and the deed and mortgage were duly recorded on July 25, 1872. On April 12, 1873, T. G. Fladeland, with intent to defraud plaintiffs and his other creditors, and without consideration, conveyed the land to his brother John G. Fladeland, who took the conveyance with knowledge of his grantor's fraudulent intent. On January 19, 1874, Marsh foreclosed his mortgage, and at the sale purchased the land for \$1,033.68 (the amount then due on the mortgage) and received the proper certificate of sale, which was duly recorded on February 6, 1874. On April 25, 1874, T. G. Fladeland agreed with defendant Mathews for a loan of \$1,350 by the latter to the former, to be evidenced by three notes of that date, to be made by John G. Fladeland, one for \$350, payable in six months, and two notes of \$500 each, payable in three and five years respectively, and to be secured by a mortgage by John G. Fladeland and wife on the said land. The notes and mortgage were made and delivered to Mathews on April 25, 1874, and he then paid to T. G. Fladeland, as part of the loan of \$1,350, the sum of \$375, but did not then pay nor has he ever paid to him the remaining \$975. The mortgage was duly recorded on April 27, 1874, and has never been foreclosed or satisfied of record.

At the time the loan was negotiated, and as one of its conditions, T. G. Fladeland agreed to furnish Mathews with an abstract of title to the land as soon as he could obtain it at the county seat, which abstract should show the title to the land to be clear and perfect in John G. Fladeland, and also stated that the Marsh mortgage was then due, but had not been foreclosed, and could be paid off at any time; and it was agreed that T. G. Fladeland should at once procure and furnish Mathews with a satisfaction of the Marsh mortgage, and that, upon receiving the abstract showing a clear title in John G. Fladeland and also the satisfaction of the Marsh mortgage, Mathews should pay over to T. G. Fladeland the balance of the loan. The abstract was not furnished till August 8, 1874, and did not show a clear unincumbered title in John G. Fladeland; the satisfaction of the Marsh mortgage was never furnished, and the terms and conditions of the loan of \$1,350 were never fully complied with, nor the loan completed. Mathews first learned on May 20, 1874, of the fraud in the conveyance from T. G. to John G. Fladeland, and on July 22, 1874, he first learned of the foreclosure of the Marsh mortgage.

On November 9, 1874, Mathews procured from Marsh an assignment of the certificate of sale on the foreclosure, paying him therefor the sum of \$1,094, being the amount then due on the certificate, and required to redeem from the sale. Part of this \$1,094 consisted of the \$975 retained by Mathews from the \$1,350 he had agreed to lend to T. G. Fladeland. The time for redemption from the foreclosure sale to Marsh expired on January 19, 1875, and on April 13, 1875, Marsh executed and delivered to Mathews a quitclaim deed of the land, which was recorded April 21, 1875, and the only consideration for which was the \$1,094 paid for the assignment of the certificate. On April 16, 1875, John G. Fladeland and wife executed and delivered to Mathews a quitclaim deed of the land, in consideration of the surrender

of the three notes and mortgage held by Mathews, and for no other consideration. This deed was recorded on April 21, 1875.

On November 9, 1874, when Mathews procured the assignment from Marsh of the certificate of sale, he had full knowledge of the fraud in the conveyance from T. G. to John G. Fladeland, and he took the assignment to secure the title to the land in himself, and without the knowledge or consent of the Fladelands, or either of them. Neither of the Fladelands has ever consented to the assignment. T. G. Fladeland had no knowledge of and never consented to the execution and delivery of the quitclaim deed from Marsh to Mathews, or of the quitclaim deed from John G. Fladeland and wife to Mathews, or the surrender of the notes and mortgage by Mathews.

At a conversation between T. G. Fladeland and Mathews at the time of the agreement for the loan of \$1,350, Iverson, one of the plaintiffs, was present, and understood T. G. Fladeland to say that he was himself the owner of the land.

Mathews never offered to T. G. Fladeland to rescind the agreement for the loan, and never demanded of him the \$375 actually lent, nor offered to deliver to him the notes and mortgage made by John G. Fladeland. But after learning that the conveyance to John G. Fladeland was fraudulent, Mathews did offer to him to rescind the agreement, and demand of him that it be rescinded, and demand repayment of the \$375, and that John G. take back his notes and mortgage, which he refused to do. After his purchase of the certificate of sale and the expiration of the time for redemption, Mathews offered to convey the land to John G. Fladeland for \$1,700—a little less than it had cost him—which offer was refused. On August 12, 1875, Mathews conveyed the land in fee to one Hagan, for \$2,700, which was paid in cash.

Among other conclusions of law the referee held that Mathews acquired no title to the land by the assignment or the

quitclaim deed from Marsh, or the quitclaim deed from John G. Fladeland and wife, except in trust for the creditors of T. G. Fladeland, including the plaintiffs, and that as such trustee he should pay over to plaintiffs, to the extent of their claims, the amount received on the sale to Hagan, less the amount (\$1,688.70, and interest,) which the land had actually cost him. Judgment was accordingly ordered and entered for plaintiffs, and the defendant Mathews appealed.

C. H. Berry and H. R. Wells, for appellant.

N. Kingsley and O. S. Berg, for respondent.

CORNELL, J. The only estate or interest in the land in question which could be affected by any resulting trust in favor of the respondents as the creditors of T. G. Fladeland, was that which belonged to him when he made the fraudulent conveyance to J. G. Fladeland. That was the equity of redemption remaining in him as mortgagor, after the foreclosure of the mortgage which he had previously given to Marsh, and the sale of the premises thereunder, the time for redemption not having then expired. That equity appellant never acquired nor held. The quitclaim deed to him from J. G. Fladeland conveyed nothing, for all rights of the mortgagor, T. G. Fladeland, and of those subsequently claiming under him, had then become extinguished by the foreclosure of the Marsh mortgage, and the perfection of the title thereunder, through the failure of any one to redeem within the time allowed by law. The mortgage which he took from the fraudulent grantee did not pass that equity, but only operated as a lien upon it, giving him the right of redemption of a junior mortgagee from the sale upon the foreclosure of the prior mortgage to Marsh. This right he did not exercise. He has never foreclosed his mortgage, nor asserted any claim to the property under it, so far as appears from the record. As no one can be treated as a trustee of an estate or interest in property which he has never held, and over which he has never had any control or right of control, it is plain that appellant cannot be made liable as such in respect to the

equity of redemption which was transferred to J. G. Fladeland by the conveyance from T. G. Fladeland, and which was the only estate or interest in the land that was passed by that conveyance.

The title which he acquired from Marsh by the purchase and assignment of the certificate of sale, and which became perfect and absolute through the failure of any one to redeem, was not affected by any trust arising out of the fraudulent conveyance from T. G. to J. G. Fladeland. By it the equity of redemption which remained in T. G. Fladeland after the execution of the mortgage to Marsh, and which was the only property in which the respondents, as creditors of the former, had any interest, was cut off and extinguished. It was legally competent for appellant to make the purchase he did, and to take the assignment of the certificate of sale in his own name and for his own benefit. The agreement between him and the Fladelands contained no stipulations preventing it, or making it his duty to redeem the property from the Marsh foreclosure and sale, or to advance any money for that purpose. In fact, the contingency of a purchase or redemption could not have been contemplated, for the agreement was entered into on the part of Mathews upon the express understanding and belief, founded upon the representations and promises of T. G. Fladeland, that the Marsh mortgage had not then been foreclosed, and that its satisfaction of record was to be procured by the latter at once and before the loan could be consummated. Aside from that agreement, appellant owed no duty to either of the Fladelands or the respondents in respect to the matter. None could arise out of the fact that he had been fraudulently deceived into taking a mortgage upon the property from J. G. Fladeland, in ignorance of the character of his title and of the equities of the respondents, or out of the fact that afterwards, and before procuring the assignment, he became informed of the truth of the matter. The assignment which he purchased and took to himself in no way prejudiced the respondents. It did not prevent them from

redeeming from the sale on the Marsh foreclosure, nor embarrass them in the least in the exercise of that right. They could have redeemed as well after the assignment as before. As this right of redemption was the only interest they had in the land as the judgment creditors of T. G. Fladeland, it is evident they have suffered no loss or injury from the assignment.

It is suggested by respondents, as a ground of liability, that appellant acted in bad faith towards them in failing to advise them of the fraudulent character of the conveyance from their debtor to J. G. Fladeland, upon learning the facts in relation thereto, and in secretly taking advantage of such knowledge, and of his position as a mortgagee of the latter, to obtain an assignment to himself of the certificate of sale from Marsh. Upon the facts found by the referee, it is impossible to see wherein the appellant has violated any rule of law, or of morals even, in any act done or omitted to be done by him in the transaction. He had no relations with respondents, arising out of any agreement or otherwise, that made it his duty to volunteer any information to them concerning the transfer from T. G. to J. G. Fladeland, or which prevented him from acting upon whatever knowledge he had in protecting his own interests; and certainly Iverson has no cause for complaint in this regard, for it appears that, at the time of the negotiations between Mathews and the Fladelands, at which he was present, he understood they were being conducted upon the basis that T. G. Fladeland was the actual and beneficial owner of the property, though the legal title was in J. G. Fladeland, and yet he kept silent, and did not inform Mathews that such title was fraudulent as against himself and the other respondents, as the creditors of T. G. Fladeland. The complaint that appellant procured the assignment secretly, or by means of his position as a mortgagee of the fraudulent grantee, is wholly without support in the findings. He acted openly and independently as a purchaser of the Marsh title, and at once put the assignment

upon record, thereby notifying the public of his claims; and, as this occurred more than two months before the period for redemption expired, respondents had ample opportunity and time to redeem if they so desired.

Respondents make the further point that inasmuch as appellant, in making the purchase of the Marsh title, with knowledge of all the facts, used \$975 of the money which he had agreed to loan to T. G. Fladeland, but retained at the time he received the notes and mortgage from J. G. Fladeland, he is, therefore, liable; because, not having rescinded the agreement, that money became a trust fund in his hands for the benefit of the creditors of T. G. Fladeland, from the moment he received notice of the fraudulent character of the deed to J. G. Fladeland. This point rests, of course, either upon the proposition that said money was paid on account of that agreement, or that the debtor of respondents was legally entitled to it. Neither of these propositions is sustained by the facts found by the referee. It is expressly found that the sum or "balance of \$975 was never paid or delivered by Mathews to the Fladelands, or either of them, or to any other person for them or either of them," and that "he made the purchase and took the assignment without their knowledge or consent, intending thereby to secure the title to the land in himself." It cannot, therefore, be claimed that he paid the money on account of that agreement, or in recognition of any liability under it. By the express terms and conditions of said agreement, T. G. Fladeland could have no legal claim upon appellant for the money until the performance by him of the stipulations therein as to procuring the abstract of title to the land, and the satisfaction of the Marsh mortgage; and, by the findings, it appears that those stipulations have never been performed, and that they are incapable of performance. Moreover, the agreement having been obtained from Mathews by fraudulent misrepresentations and promises, it could not be enforced against him, as it appears that he has never done anything under it, nor realized any benefits from it, since the

discovery of the fraud. It follows that said money legally belonged to appellant when he used it in procuring the assignment, and that he was under no legal or equitable obligation in respect thereto to T. G. Fladeland or his creditors.

This disposes of all the points urged in support of the judgment below, which is manifestly erroneous in holding the appellant liable as a trustee in respect to the land in controversy, and it is therefore reversed, and judgment for defendant ordered.

37	338
39	119
37	338
48	311
37	338
55	549

MICHAEL SENNETT vs. JOHN SNEHAN.

November 16, 1880.

Contract—Concurrent and Dependent Stipulations.—Plaintiff paid defendant \$50, "as and for a part of the purchase price" of a tract of land, which the latter by parol agreed to sell and convey to the former, whenever thereto requested, no time being stated when the balance of the purchase-money was to be paid. *Held*, the payment of such balance and the conveyance of the land were dependent acts, to be concurrently performed, and that plaintiff is not entitled to recover back the partial payment so made, without averring and showing an offer and readiness to perform on his part, as well as a refusal to perform on the part of defendant.

Appeal by defendant from an order of the municipal court of Stillwater, overruling his demurrer to the complaint, which alleges that on or about July 3, 1878, defendant agreed to sell and convey to plaintiff eighty acres of land in Washington county, and to execute and deliver a warranty deed thereof to plaintiff, when requested; that thereupon and relying on such agreement, the plaintiff paid to defendant the sum of \$50, as part of the purchase-money of such land; but that, though often requested so to do, the defendant refuses to convey the land according to his agreement, or to return the \$50 paid him on account of the purchase-money, for which sum, with interest from July 3, 1878, plaintiff demands judgment.

L. E. Thompson, for appellant.

Gregory & Comfort, for respondent.

CORNELL, J. The complaint alleges that the sum of \$50, which is sought to be recovered in this action, was paid by plaintiff to defendant "as and for part of the purchase price" of certain land therein described, which it is alleged the defendant agreed by parol to sell and convey to plaintiff whenever the latter should request. It is not stated what the consideration for the promise to convey was, nor when it was to be paid. Whatever it was, however, inasmuch as the agreement stated is silent as to the time when the unpaid portion of the purchase-money was to be paid, it must be presumed that the parties intended it to be payable at the same time the land was to be conveyed, for such a construction best accords with the rights and interests of both parties. *Lester v. Jewett*, 11 N. Y. 453, 458.

Thus considered, the payment and the conveyance must be treated as concurrent and dependent acts, to be performed at the same time. The rule in respect to contracts of that character is that neither party can compel performance by the other, or rescind for non-performance, without first offering and being ready to perform on his part. This rule applies to all contracts with mutual and dependent covenants or promises, including alike parol contracts, void as such by the statute of frauds, and those not affected by the statute. *Abbott v. Draper*, 4 Denio, 51. The agreement which the parties entered into in this case was not an illegal one, and therefore incapable of being performed, if they were willing to abide by its terms. The plaintiff voluntarily paid to defendant the sum which he now seeks to recover, as a partial payment upon this contract, and so long as the defendant is not in default, but is willing and ready to perform on his part, he is not at liberty to rescind the agreement and recall his money, because the statute declares the contract to be void as not being in writing. *Abbott v. Draper*, *supra*. Under the agreement, as stated, defendant is under no obligation to convey

until the balance of the purchase-money has been tendered him, and as the complaint contains no averment of a readiness and offer to perform in this regard, on the part of the plaintiff, it shows no cause of action.

The order overruling defendant's demurrer is reversed.

LUTHER B. WELD *vs.* MINNIE B. WELD.

November 16, 1880.

Desertion by Wife—Separation under Authority of Court.—A district court judgment, in an action between a wife and her husband, adjudging that the latter shall pay monthly to the former the sum of \$30, for her separate support and maintenance, until the further order of the court, is an implied authority for the wife to live separately and apart from her husband; and such living on her part, while the judgment remains in force, is not, though accompanied with a refusal to live and cohabit with her husband, an act of desertion within the meaning of Gen. St. 1878, c. 69, § 5.

Appeal by plaintiff from a judgment of the district court for Rice county, *Buckham, J.*, presiding. The action was brought under Gen. St. 1878, c. 69, § 5, to debar defendant from any right of dower in the lands of plaintiff, (her husband,) and to obtain for plaintiff full control over such lands, and power to convey the same without the signature of defendant, etc.

J. H. Case, for appellant.

A. D. Keyes, for respondent.

CORNELL, J. In Gen. St. 1878, c. 69, § 5, the term "desertion" is used in the same sense in which it is used in the fifth subdivision of section 6 of the statute relating to the subject of divorce. Gen. St. 1878, c. 62, § 6, subd. 5. It imports such a wilful abandonment by one party of the other, without any sufficient cause or excuse, as constitutes, when continued for three years, good ground for an absolute divorce

in favor of the deserted party. It involves a violation of marital duty and obligation on the part of the one guilty of the act of desertion, and is, therefore, wrongful and unlawful. A separation which is sanctioned and authorized by the decree or judgment of a court of competent jurisdiction is neither wrongful nor unlawful, and cannot be made a ground for divorce as against the party rightfully acting under it.

Upon the allegations of the pleadings herein it stands admitted "that in and by a certain judgment, rendered by the district court of the county of Rice, in this state, on the first day of February, 1878, in a certain action then pending in said court between the above-named parties, it was, among other things, ordered and adjudged that the above-named plaintiff (the defendant in said action) pay to the above defendant, (the plaintiff therein,) or her order, until the further order of said court to the contrary, the sum of \$30 per month for her separate support and maintenance, payable on the first day of each and every month, commencing on the first day of March, 1878," and that said judgment has ever since remained in full force and effect. The validity of this judgment is not open to question in this action, for the subject was one within the jurisdiction of the court in which it was rendered, and want of jurisdiction over the parties is not shown of record. It is evident, therefore, that the desertion by defendant, which is alleged in the complaint to have commenced on the 15th day of August, 1877, ceased to be such on the first day of February, 1878; for the judgment then rendered for her separate support and maintenance authorized her to live separate and apart from her husband so long as it remained in force. It follows that the present action cannot be maintained, for there has not been a continued desertion, within the meaning of the statute, for the space of one year.

Judgment affirmed.

A. D. PETTINGILL vs. IGNATIUS DONNELLY.

November 17, 1880.

Appeal from Justice of Peace.—A notice of appeal from a judgment rendered by a justice of the peace, which wholly fails to show by what justice or in what county the judgment was rendered, is a nullity.

Appeal by defendant from an order of the district court for Stevens, Big Stone and Traverse counties, *Brown, J.*, presiding, dismissing an appeal.

O'Brien & Eller, for appellants.

C. L. Brown, for respondent.

CORNELL, J. The notice of appeal which was served upon plaintiff, and filed with the justice, purports to be a notice of an appeal from a judgment rendered by a justice of the peace in a justice's court, in the state of Minnesota, on the 11th day of September, A. D. 1879, in a cause between A. D. Pettingill, plaintiff, and Ignatius Donnelly, defendant, in favor of said plaintiff therein and against the defendant. The amount of the judgment is not stated, the name of the justice is not given, and nothing appears upon the face of the notice to indicate in what county or by which of the many courts of justices of the peace in the state the judgment complained of was rendered. The notice contains no reference by the aid of which this want of information can be supplied. A notice thus wholly defective in respect to the identification of the subject-matter of the appeal is ineffectual for any purpose. It cannot be helped by proof of any extrinsic facts showing the intention of the party, nor can the defect be cured by amendment, after the time for bringing the appeal has expired. The appeal to the district court was rightly dismissed for want of jurisdiction, and the decision of that court is affirmed.

JOHN ROBSON vs. CONRAD BOHN.

November 20, 1880.

Contract for Sale of Lumber, to be delivered in Instalments—Dependent Covenants.—A contract for the sale of 425,000 feet of lumber of various kinds and qualities, certain specified kinds to be delivered on board cars, and other kinds on the vendee's land, provided that the whole should be delivered on or before September 1st; that the vendor should, immediately on the execution of the contract, commence delivery, and continue delivering, at the rate of 20,000 feet per week, till the whole should be delivered; that the vendee should pay \$3,000 in his note on the execution of the contract, \$2,000 on the first of August, and the remainder of the price when the whole should be delivered; the price to be at the rate of \$15.50 per thousand feet. *Held*, that the covenant to continue delivering after August 1st was dependent on that to pay the \$2,000; and that if the vendor delivered at the agreed rate till that day, and the vendee, without excuse, refused to pay the \$2,000, the former might treat the contract as abandoned, and recover the market value of the lumber delivered.

Same—Request to suspend Delivery.—A request by the vendee upon the vendor not to ship any more lumber (on the cars) till further notice, justified the latter in suspending all delivery while the request remained in force.

Same—Delivery of Inferior Lumber in Addition to Lumber due.—If, on August 1st, the vendor had delivered at the agreed rate of the kinds and qualities required by the contract, it was no excuse to the vendee, to refuse payment of the \$2,000, that the vendor had, in addition, delivered some which was not of the quality required by the contract, and which was rejected by the vendee.

This action was originally brought in the district court for Winona county, to recover, at the contract price, for lumber delivered by the plaintiff to the defendant, under the contract hereinafter set forth. After the decision of this court on a former appeal, (*Robson v. Bohn*, 22 Minn. 410,) that plaintiff could not maintain his action on the contract, and after the cause had been remanded to the district court, the plaintiff, by leave of court, amended his complaint, alleging that on May 19, 1873, the plaintiff entered into a written contract with defendant whereby he agreed to sell and deliver to defendant 425,000 feet of lumber, consisting of 60,000 feet of com-

mon boards, 85,000 feet of clear or finishing lumber, 182,871 feet of dimension lumber, and 32,129 feet of other lumber, the kind not specified except that it was not to include finishing lumber or flooring; all the lumber to be of as good quality as was then usually sold in the city of Winona of the grades mentioned; the flooring and finishing lumber to be delivered near plaintiff's lumber-yard at Winona, and all the balance to be delivered free on board cars at Winona, and all to be delivered on or before September 1, 1873, the delivering to begin at once and to continue, at the rate of not less than 20,000 feet per week, until the whole should be delivered; in consideration whereof the defendant agreed to pay plaintiff for such lumber at the rate of \$15.50 per thousand feet, and to give in part-payment his promissory note for \$3,000, payable July 10, 1873, to pay \$2,000 more in cash on August 1, 1873, and pay the balance on the full delivery of the lumber. That plaintiff at once began performing the contract, and on May 20, 1873, delivered to defendant, at his special request, at plaintiff's lumber-yard at Winona, 2,000 feet of clear or finishing lumber, and in like manner, on the day following, 1,000 feet more of the same kind; and on May 22d delivered to defendant, free on board cars at Winona, 6,000 feet of roofing, and 6,000 feet of dimension lumber, all of which was duly received and retained by defendant; that plaintiff was prepared and intended to continue the delivery of lumber on the contract right along, according to its terms, but that the defendant then notified plaintiff that he was not prepared to receive the lumber, and requested plaintiff to suspend any further delivery of lumber until further notified by the defendant, and also requested that the common boards and balance of the roofing be not delivered on board the cars unless further specially so directed, but that he would send his teams for and receive the same at plaintiff's yard as he might want it, which said requests of defendant as to a change in the place and mode of delivery, and a present suspension of the delivery of lumber, were acceded to and complied with by plaintiff;

and that, in compliance with the request of defendant, the further delivery of lumber upon the contract was suspended until June 7, 1873, at which time the plaintiff resumed the delivery of the lumber, and thereafter continued to deliver the same, as required by the contract as modified at defendant's request as to the mode and place of delivery, until August, 1873.

That he delivered to defendant upon the contract (at dates and in quantities and of values specified) between May 22d and August 1, 1873, 202,207 feet of lumber of the market value of \$3,630.29, and in all respects performed the contract on his part as required by its terms as modified as aforesaid, until the defendant made default in his payments on the contract. That defendant made the \$3,000 payment mentioned in the contract, but neglected and refused to make the \$2,000 payment on August 1, 1873, when it became due, and has ever since neglected and refused to pay the same or any part thereof, and has made no other than the \$3,000 payment on the contract. That after defendant's neglect and refusal to make the \$2,000 payment when due or thereafter, and because of such neglect and refusal, the plaintiff stopped and refused further delivery upon the contract, but was prepared, ready and willing to go on and fully perform the contract on his part if the defendant would make payment as agreed. That there is a balance of \$630.29, for which sum, (as well as for the value of certain lumber not included in the contract, but sold by plaintiff to defendant and forming the basis of two other causes of action not here material,) with interest from August 1, 1873, judgment is demanded.

The defendant in his answer set forth the written contract stated in the complaint, (without the schedule annexed to it,) in words following:

"This agreement made this 19th day of May, 1873, by and between John Robson of the city of Winona, * * party of the first part and Conrad Bohn, of the same place, party of the second part, witnesseth:

"The said party of the first part covenants and agrees to and with said party of the second part to sell and deliver to said party of the second part 425,000 feet of lumber—392,871 feet as per schedule annexed, and the remainder of said lumber to include neither finishing lumber nor flooring; all of said flooring and finishing lumber to be stacked up on the land belonging to said Bohn, a short distance east of said Robson's lumber-yard; the balance of said lumber to be delivered free on board of cars at Winona. All of said lumber to be delivered on or before the 1st of September, 1873; said delivering to commence immediately, and continue at the rate of not less than 20,000 feet per week till the whole is delivered. And said party of the first part covenants that said lumber shall be good, sound, merchantable lumber, of as good quality as is usually sold in the city of Winona of the various grades mentioned in the schedule hereto attached and made part of this contract.

"And the said party of the second part covenants and agrees to deliver to said party of the first part, on the delivery of this agreement, his promissory note for \$3,000, payable July 10, 1873, and the further sum of \$2,000, August 1, 1873; and, on the full delivery of the said 425,000 feet of lumber, as aforesaid, to pay therefor the sum of \$15.50 for each and every thousand feet of lumber aforesaid so delivered, less the amount of \$5,000 above mentioned.

"And for the true and faithful performance of each and every one of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other. In witness," etc. [Signed and sealed by both parties.]

The answer further alleges that the lumber contracted for was to be used by defendant in constructing a public building at St. Peter (the Hospital for the Insane) which defendant was under contract to erect and complete within a certain time under a heavy forfeit, as plaintiff when the contract was made well knew; denies any modification, suspension or abandonment of the written contract; alleges that on August

1, 1873, plaintiff had not furnished, by many thousand feet, the quantity of lumber then due upon the contract, and has ever since refused to make up such deficiency, and that the quality of much of the lumber furnished was inferior to that required by the contract—especially that 6,000 feet of lumber, loaded on car and shipped by plaintiff to St. Peter without defendant's knowledge, as roofing, was not such roofing as the contract required, but was rotten lumber known as "culls;" that defendant refused to receive it, and notified plaintiff to take it away and furnish good lumber in its place, which the plaintiff refused to do; and that the same is part of the lumber claimed in the complaint to have been delivered under the contract. That on August 1st, at which time many thousand feet of lumber were past due and not delivered, the defendant requested of plaintiff the delivery of lumber under the contract, but plaintiff refused to do so; and that plaintiff, being thus in default, did on August 4th demand the \$2,000, payable by the terms of the contract on August 1st, which the defendant was willing and ready and then offered to pay if plaintiff would perform the contract on his part; but the plaintiff wholly refused to do so, for which reason solely the defendant refused to make the \$2,000 payment.

The place of trial having been changed to Goodhue county, the action was tried in that county by *Crosby, J.*, without a jury. At the trial there was a conflict of evidence as to whether defendant requested plaintiff to suspend all deliveries between May 22d and June 7th, or merely deliveries on cars. In regard to defendant's refusal to make the \$2,000 payment, it appeared that he put his refusal on the ground mainly of deficiency in quality of the lumber delivered up to that time, and would not make the payment without an assurance from plaintiff that he would deliver better lumber in the future. The plaintiff testified that his reply was "that we had a contract already, and that it was not necessary to vary it; that we had no other qualities to deliver; that the

qualities would be the same that we had delivered, and that was our understanding."

Upon the matters in issue, the court found that the lumber mentioned in the complaint was delivered by plaintiff to defendant between May 20, 1873, and August 1, 1873, at the rate of fully 20,000 feet per week, except that between May 22d, and June 7th, all delivery was suspended, in consequence of a request made by defendant to plaintiff on May 21st to suspend all shipments until further notified by plaintiff; that all the lumber delivered was of the quality required by the contract, except the 6,000 feet of roofing mentioned in the answer, which was of inferior quality and was rejected by defendant, leaving the whole amount delivered and accepted 196,207 feet, the market value of which was also found. As conclusions of law the court held that defendant's request to suspend shipments excused the plaintiff from delivering any lumber between May 22d and June 7th; that the plaintiff at the time of the suspension had fully performed the contract on his part; that between June 7th and August 1st the plaintiff delivered to the defendant fully 20,000 feet of lumber per week, and on August 1st had fully performed the contract on his part, except as relieved therefrom at the request of defendant; that the covenants in the contract are dependent, and that defendant's refusal to make the \$2,000 payment on August 1st was a breach of the contract and relieved the plaintiff from any further obligation to perform on his part; that the plaintiff cannot recover for the 6,000 feet of roofing rejected by defendant, but is entitled to recover what the remainder of the lumber delivered under the contract was reasonably worth. The defendant moved for a new trial, which was refused, and he appealed to this court.

Robert Taylor, for appellant.

1. The request not to ship any more lumber until further notice was confined to that part of the lumber to be delivered on the cars, and did not extend to that part of the lumber (which included the 125,000 feet of flooring and finishing)

which was to be stacked on defendant's land near plaintiff's yard, and was not to be shipped at all. A mutual agreement to suspend shipments on cars for a time cannot be construed so as to suspend or excuse all deliveries under the contract. Upon such a construction, though only a few thousand feet were required to be delivered on cars for shipment, and all the rest was to be delivered on defendant's lot, yet a mutual agreement to delay shipment of the few thousand feet for any period—say till after August 1st—would allow plaintiff to neglect to deliver a foot of lumber of any kind, and yet require payment of the \$3,000 on July 10th, and of the \$2,000 on August 1st, under the contract. It is evident that such was not the intention of the parties, and that neither of them had any thought of a waiver of that provision of the contract requiring deliveries to begin at once, and continue at the rate of not less than 20,000 feet per week till the whole should be delivered. Nor did the request to suspend car deliveries amount to such waiver. This consideration is important, because if it was such a waiver, and excused plaintiff from delivering any lumber during the fifteen days from May 22d to June 7th, then for the remainder of the time to August 1st, there were delivered 20,000 feet per week; but if not such a waiver and excuse, then plaintiff was in default as to the quantity delivered, (to say nothing of the quality,) for by August 1st there should have been delivered 211,000 feet, while the court finds that there was delivered only 196,207 feet, and plaintiff only claims to have delivered 202,207 feet.

Plaintiff being in default on August 1st as to the quantity of lumber delivered, this, with his refusal to deliver more, was a breach of the contract, which justified defendant (if the covenants are dependent) in refusing payment of the \$2,000, except on fulfilment by plaintiff. *Robson v. Bohn*, 22 Minn. 410; *Dey v. Dox*, 9 Wend. 129; 2 Chitty Cont. 1083; 2 Parsons Cont. 525, *et seq.*, 528, 529. If the covenants are dependent, they are so in the order of their required performance, and plaintiff's default and refusal were the first breach.

Plaintiff had also violated the contract in respect to the quality of the lumber delivered. The 6,000 feet of roofing, sent by car to St. Peter on May 22d, was certainly not as good as the contract required. Here was a conceded breach of the contract. But the plaintiff, when defendant refused to accept this roofing, replied that he had no other qualities to deliver, and that the qualities would be the same as he had delivered. The contract called for 25,000 feet of roofing, of which only 3,000 feet were delivered besides the rejected 6,000 feet. Yet plaintiff insisted that defendant must accept that inferior roofing under the contract, and declared that he had no other qualities to deliver and that the qualities would be the same in future; and in this action plaintiff seeks to recover for this rejected roofing as fully as for any portion of the lumber delivered.

Not only was this a breach of the contract, which was never waived by defendant, but this declaration and refusal to deliver any better quality was itself a new and continued breach, and defendant had a right so to consider it. *Hochster v. De La Tour*, 2 El. & Bl. 678; *Danube & Black Sea Ry. Co. v. Xenos*, 13 C. B. (N. S.) 825; *Crist v. Armour*, 34 Barb. 378; *Skinner v. Tinker*, 34 Barb. 333; *Burtis v. Thompson*, 42 N. Y. 246; *Greenup v. Stoker*, 3 Gilm. (Ill.) 202, 213; *Thompson v. Laing*, 8 Bosw. 482; *Frost v. Knight*, Law Rep. 7 Exch. 111.

2. The covenants in the contract are not dependent. There are no words of dependence, nor words indicating that performance of any act by either party should be contingent upon performance of any other act, except only as to the payment of the final balance after all the lumber should be delivered. The stipulations show that it was neither intended that the lumber should be paid for in advance, nor as delivered, nor that deliveries should be kept in advance of payment. Payments of fixed sums were to be made on fixed dates, irrespective of the amounts delivered, and deliveries were to begin and continue at a given rate, without reference

to payments; and to the faithful performance of each and every covenant the parties bind themselves, each to the other, etc. All this shows that each relied upon the responsibility of the other, and on his remedies for a breach, if any should occur, and not upon any dependence of the covenants. Such being the evident intention of the contracting parties, the court should hold the covenants to be independent. 2 Parsons Cont. 528, *et seq.*; 2 Smith Lead. Cas. 24 and cases cited; *Milldam Foundry v. Hovey*, 21 Pick. 417; *Knight v. New England Worsted Co.*, 2 Cush. 271, 286.

Another reason for holding these covenants independent is that the damages resulting from a breach would be materially different; and the covenants go to part only of the consideration, and may be separately enforced, or the breach compensated for in damages. *Tomkins v. Elliot*, 5 Wend. 496; 2 Smith Lead. Cas. 25, 26, and cases cited; *Goldsborough v. Orr*, 8 Wheat. 217; *Freeth v. Burr*, Law Rep. 9 C. P. 208; *Tipton v. Feitner*, 20 N. Y. 423; *Keenan v. Brown*, 21 Vt. 86; *Franklin v. Miller*, 4 Ad. & El. 599; 6 Cent. Law Journal, 322.

There is a clear distinction in this respect between the case at bar and those cases where goods are to be paid for as delivered, or work is to be paid for as it progresses—such as *Withers v. Reynolds*, 2 B. & Ad. 882; *Evans v. Chicago & Rock Island R. Co.*, 26 Ill. 189; *Canal Company v. Gordon*, 6 Wall. 561; *Hale v. Trout*, 35 Cal. 229, 242; *Hoagland v. Moore*, 2 Blackf. 167; *Jewell v. Blandford*, 7 Dana, 472. See *Franklin v. Miller*, 4 Ad. & El. 599, and the other cases before cited, for the distinction.

3. There was no such abandonment or breach of the contract by defendant as to entitle plaintiff to rescind and recover the retail market price of the lumber delivered. Defendant was ready and willing to perform, and offered to do so if plaintiff would perform on his part, and he insisted on such performance by plaintiff. Only part of the lumber having been delivered and accepted, the plaintiff is entitled to re-

cover therefor the contract price only; and if, as we claim, he was guilty of a breach in refusing to deliver the balance of the lumber of a proper quality, the defendant should be allowed to recoup his damages for such breach. Sedgwick on Damages, 215, *et seq.*; 2 Smith Lead. Cas. 56, 60; *Evans v. Chicago & Rock Island R. Co.*, 26 Ill. 189; *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646; *Britton v. Turner*, 6 N. H. 481, 495; *Tipton v. Feitner*, 20 N. Y. 423.

Gilman & Clough, for respondent.

It was not plaintiff's fault that the 20,000 feet were not delivered weekly during the two weeks of suspension; but whether the plaintiff delivered the required weekly quantity or not is wholly unimportant, for, even if he was in default, he is entitled to recover on a *quantum valebat* for the amount delivered. This court, in 22 Minn. 410, has already so ruled. The plaintiff has now sued and recovered on the *quantum valebat*—the only basis on which he could recover, if himself in default; but if not in default, he might elect to claim on the *quantum valebat* or on the contract. 2 Smith Lead. Cas. 40, *et seq.*; *Upstone v. Weir*, 9 Reporter, 677. The same would have been the case also, if plaintiff had been in default as to the quality of the lumber delivered. Except as to the roofing, the court finds that the plaintiff, on each delivery, rendered to defendant a written bill showing the quantity, kind and character of the lumber delivered. The defendant received, retained and used the lumber, and cannot be heard to object to its character or quality after having thus accepted it as answering the requirements of the contract. If he intended to object to any of it as not answering the contract, he should have returned or offered to return it. *McCormick v. Sarson*, 45 N. Y. 265; *Reed v. Randall*, 29 N. Y. 358, 364; *Beck v. Sheldon*, 48 N. Y. 365; *Gaylord Manufacturing Co. v. Allen*, 53 N. Y. 515; *Dutchess Company v. Harding*, 49 N. Y. 321.

2. Defendant's refusal to pay the \$2,000 on August 1st justified plaintiff in refusing to deliver more lumber. *Dwinell*

v. *Howard*, 30 Me. 258; *Reybold v. Voorhees*, 30 Pa. St. 116; *Hartje v. Collins*, 46 Pa. St. 268; *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646; *Evans v. Chicago & Rock Island R. Co.*, 26 Ill. 189. Defendant's refusal—whether with or without excuse—was an abandonment of the contract, and this court so held in this case in 22 Minn. 410. If defendant wished to preserve his right to future deliveries under the contract and to damages in case of its non-delivery, he should have paid the \$2,000. Failing in that, he waived and lost his right to the balance of the lumber, and, as a consequence, his right to any damages for its non-delivery. If both parties were in default, it was a rescission of the contract. Such was the former ruling of this court, and so it is held in *Harris v. Bradley*, 9 Ind. 166.

Defendant did not put his refusal to pay the \$2,000 on the ground that the required quantity had not been delivered, but on the ground that the lumber delivered was not satisfactory, and that plaintiff would not give assurances as to the future delivery of the lumber. But defendant had no right to demand any other assurance from plaintiff than that furnished by the contract itself. His remedy was by refusal to receive lumber not in accordance with the contract, and by action for damages.

3. Upon the question of the covenants in the agreement being dependent or independent, and in addition to cases before cited, we call particular attention to *Cunningham v. Morell*, 10 John. 203; *Grant v. Johnson*, 5 N. Y. 247; *Bean v. Atwater*, 4 Conn. 3; *Kane v. Hood*, 13 Pick. 281; *Leonard v. Bates*, 1 Blackf. 172.

GILFILLAN, C. J. Action to recover the value of lumber delivered to defendant. On May 19, 1873, the parties entered into a written contract, by which plaintiff agreed to sell and deliver to defendant 425,000 feet of lumber of various descriptions, as set forth in a schedule attached to the contract; certain of the lumber to be stacked by plaintiff on land of defendant in Winona, the remainder to be delivered free on

board cars at Winona; all to be delivered by September 1, 1873; the delivering to commence at once, and continue, at the rate of not less than 20,000 feet per week, till the whole was delivered, and all to be good, sound, merchantable lumber, of as good quality as is usually sold in the city of Winona. The defendant agreed to deliver to plaintiff, on the execution of the agreement, his note for \$3,000, payable July 10, 1873, and the further sum of \$2,000 August 1, 1873; and on the full delivery of the lumber, to pay therefor at the rate of \$15.50 per thousand feet, less the said \$5,000.

One question made in the case is, was plaintiff's covenant to deliver lumber after August 1st dependent upon defendant's covenant to make the payment of \$2,000 on that day, so that if defendant, the plaintiff not being in default, refused to make that payment, the plaintiff could refuse to deliver any more lumber, and, if defendant's refusal were persisted in, treat the contract as abandoned? Although the contract does not in terms express that any one of the covenants shall be dependent on another, there can hardly be a question that they were intended to be so in the order in which they are to be performed. That is, that plaintiff's obligation to deliver any lumber at all depended on defendant performing his covenant to deliver the note for \$3,000; defendant's covenant to pay \$2,000 August 1st, on plaintiff's performance up to that time of his covenant to deliver at the rate of 20,000 feet per week; plaintiff's obligation to continue delivering after that time, upon the payment of the \$2,000; and defendant's obligation to make the final payment, upon plaintiff's complete performance of the contract on his part. It cannot reasonably be supposed that the parties intended that either party should be bound to perform on his part, though the other should refuse to do what he was required to do. No one could doubt that, in a contract for the sale of property, in which the time for paying the consideration is a date prior to that for the transfer of the property, the payment of the consideration is intended to be a condition precedent to

the obligation to transfer. This does not differ materially from such a case.

On or before August 1st, plaintiff delivered only 196,000 feet of lumber, of qualities such as the contract called for; some thousands of feet less than the written contract required to be delivered on or before that day. To excuse this non-compliance with the contract on his part, plaintiff showed that, on the 22d of May, defendant requested him not to ship (that is, deliver on the cars) any more lumber until further notified by defendant, and that, pursuant to that request, he suspended delivery of lumber until June 7th, when he resumed delivery. From that time he continued to deliver at the rate of more than 20,000 feet per week. Plaintiff claims, and the court below decided, that this request relieved plaintiff from the obligation to deliver lumber during the time the request was in force, while defendant claims that that obligation continued, and plaintiff ought to have fulfilled it by delivering during that time, on defendant's land in Winona, 20,000 feet per week of the lumber to be there delivered. The court below was correct in deciding that the defendant's request, while in force, justified plaintiff in suspending delivery of lumber. Had the contract required the delivery, during that time, of any of the lumber which was to be delivered on defendant's land, the request to suspend shipping the other lumber would not have affected that requirement of the contract. But the contract did not so require. Plaintiff was, under its terms, at liberty to make up the 20,000 feet per week with the lumber to be delivered on the cars. He was under no obligation to deliver during that time any of the other lumber. The request could not have been intended nor understood by the parties to create such an obligation.

The excuse made by defendant at the time for not paying the \$2,000 was not that plaintiff had failed to deliver at the rate of 20,000 feet per week from the date of the contract, but that 6,000 feet of that delivered was not of the quality

called for by the contract. The court below found it was not of such quality, and disallowed plaintiff's claim to recover for it. But the fact did not affect defendant's obligation to pay the \$2,000. Aside from the 6,000 feet, the plaintiff had delivered more than the contract, as modified by defendant's request, required, before August 1st. The \$2,000 was not to be in payment of the lumber delivered before August 1st, nor of any particular lumber, but was to be a partial payment for the whole amount to be delivered under the contract, to wit, the 425,000 feet. The 6,000 feet not being according to contract, and defendant having refused to receive it, he could not be required to include it in the 425,000 feet on the final settlement. That 6,000 feet was as though it had never been delivered; and plaintiff, having—treating the 6,000 feet as never having been delivered—performed the contract as modified up to the date when the \$2,000 was to be paid, was entitled to receive it. The defendant, therefore, having without excuse refused to perform the contract on his part, the plaintiff had a right to treat it as at an end, as he has done, and to recover upon defendant's implied contract to pay the value of the lumber delivered to and accepted by him.

JOEL LANKTON vs. LEVI M. STEWART, impleaded, etc.

November 26, 1880.

Accord and Satisfaction—Agreement between Purchaser of Land and Holder of Mortgage for Payment of a Less Sum by Instalments "from Time to Time"—Specific Performance.—Mrs. L. was the owner of a town lot, subject to a mortgage for \$800 and interest, which was held by S., and became due June 1, 1880. Plaintiff on the one hand, and L., his wife, Mrs. L., and S. on the other, entered into an agreement, the substance of which was that plaintiff was to pay \$800, with interest at 12 per cent. per annum, for a clear and unencumbered title to the lot; \$125 thereof, with interest, to be paid to Mrs. L., and the residue, \$675, with interest, to be paid

from time to time to S. Upon the payment to Mrs. L., she and L. were to convey the lot to plaintiff, subject to the mortgage, "as limited and modified" by the agreement. Upon payment of \$675, with interest as aforesaid, to him, S. was to release and discharge any and all liens, claims or titles, of whatever nature, and especially the mortgage. Plaintiff paid Mrs. L. her portion of the purchase-money as agreed, and, at different times, paid S. \$239.75; and on March 27, 1880, tendered him the balance of the \$675 and interest, which S. refused to accept. The tender has been kept good, and the money brought into court. Plaintiff requested S. to fulfil his part of the agreement, which was refused. S., at the time of the agreement, was, and still is, owner and holder of the mortgage and note secured by it. Ever since the execution of the deed to him by L. and Mrs. L., plaintiff has been the owner of and in actual possession of the lot and its appurtenances, and he has made improvements thereon to the value of \$500. *Held*, that the rules of law relating to accord and satisfaction have no application to the facts of the case; also, further, that the agreement to pay S. "from time to time" was, in effect, an agreement to pay at such times and in such sums as plaintiff saw fit, on or before June 1, 1880, when the mortgage matured. *Williams v. Stewart*, 25 Minn. 516, distinguished from this case. *Held, further*, that plaintiff is entitled to a specific performance of the agreement of S.

Appeal by defendant Stewart from an order of the district court for Hennepin county, *Vanderburgh, J.*, presiding, overruling his separate demurrer to the complaint.

L. M. Stewart, for appellant.

Julius E. Miner, for respondent.

BERRY, J. On February 1, 1875, Andrew Lamoreaux, being the owner of lot 2, block 3, Westfall's addition to Minneapolis, conveyed the same to Winslow, who, at the same time, executed a mortgage thereon to secure his (Winslow's) promissory note for \$800 of the purchase-money, payable on or before June 1, 1880, with semi-annual interest at the rate of 12 per cent. per annum. On November 24, 1877, the note and mortgage were transferred and assigned to defendant Stewart. On April 1, 1878, Winslow conveyed the lot to Lamoreaux's wife, subject to the mortgage. On or about August 26, 1878, the plaintiff made an agreement with Lamoreaux (acting for his wife) and Mrs. Lamoreaux and Stewart, the substance of which was that the plaintiff was to pay

\$800, with interest at the rate of 12 per cent. per annum, for a clear and unencumbered title to the lot; \$125 of said sum and interest to be paid to Mrs. Lamoreaux or to her husband for her, and the residue (\$675) and interest to be paid "from time to time" to Stewart. Upon the making of the payment to Mrs. Lamoreaux, or to her husband for her, they were to convey the lot to the plaintiff subject to the mortgage, "as limited and modified" by the agreement. Upon payment of \$675 with interest, as aforesaid, Stewart was "to release, discharge, and forever quitclaim any and all liens, claims or titles, of whatever nature, and especially the aforesaid mortgage."

Pursuant to the agreement, plaintiff, on September 3, 1878, paid to Lamoreaux, for his wife, her portion of the purchase-money, to wit, \$125, and thereupon they executed and delivered to him a deed of the lot, subject to the mortgage, as in the agreement provided. On the same day, plaintiff paid Stewart \$100; on March 20, 1879, \$79.75; and on August 26, 1879, \$60,—all under and pursuant to the agreement,—and on March 27, 1880, duly tendered him the further sum of \$540, as and for payment of the amount remaining due on the mortgage, and to discharge the same, under and pursuant to the terms of the agreement; but Stewart refused and still refuses to accept. Plaintiff has ever since been ready and willing to pay said sum of \$540, and brings the same into court. Before the commencement of this action, and after the tender aforesaid, plaintiff requested Stewart to release the mortgage, and all claims, etc., upon the lot, which Stewart refused and still refuses to do.

The complaint alleges, upon information and belief, that while the note and mortgage were held and owned by Lamoreaux, Winslow paid thereon \$280. Ever since the assignment to him, Stewart has been and he now is owner and holder of the note and mortgage. Ever since the execution and delivery of the deed from Lamoreaux and wife to him, plaintiff has been owner of and in the actual possession of

the lot and its appurtenances, and he has made improvements thereon of the value of \$500. The relief asked by the plaintiff is that he be adjudged owner in fee-simple of the lot and appurtenances, and that the adverse claim alleged to be made by Stewart be adjudged void, and that the mortgage be discharged and satisfied of record, and that he have such other relief as may be equitable. Stewart interposed a general demurrer to the complaint, which was overruled by the district court.

In support of his demurrer the defendant relies mainly upon the rules of law relating to accord and satisfaction. We are of opinion that these rules have no application to the facts of this case. To us, the case as stated in the complaint appears to be one of an agreement between the plaintiff on the one hand, and the owner of the lot and the holder of a mortgage upon the same on the other hand, (the plaintiff not being a party to the mortgage, or in any way liable upon it,) for the purchase, by the plaintiff, from the owner of the lot, of his right and title thereto, for an agreed price, which has been duly paid; and, further, for the purchase by the plaintiff, from the holder of the mortgage, of a discharge of the mortgage, and of any other claim which he may have upon the lot, also for an agreed price, all of which has been duly paid or tendered. The agreement as respects the mortgage bears no analogy to an agreement between the maker and holder of a mortgage for the satisfaction and discharge of the same, by the payment by the maker of less than the amount due upon it. The plaintiff was under no obligation to pay it, and the agreement on his part was, in effect, an agreement to purchase its discharge as respected the lot upon which it was a lien. We can conceive of no reason why such an agreement to purchase, and the corresponding agreement of Stewart to sell, (there being a sufficient consideration,) are not valid and binding upon both parties. Plaintiff having paid Mrs. Lamoreaux in full, having gone into possession of the lot—a possession in which he has ever since remained—having

made valuable improvements thereon, and having made several payments to Stewart, all under and in pursuance of the original agreement between himself, the Lamoreauxs and Stewart, the case is one in which there has been an ample part-performance to take the parol agreement out of the statute of frauds, and to entitle plaintiff to demand a specific performance of Stewart's agreement in a court of equity, upon the ground that no other remedy will adequately secure his rights.

The defendant urges one objection to the validity of the agreement which deserves particular consideration. The objection is that the alleged agreement is too indefinite for specific enforcement as respects the time of payment of the amount which was to go to Stewart. This amount was, by the terms of the agreement, as alleged in the complaint, to be paid "from time to time." The defendant's counsel cites *Williams v. Stewart*, 25 Minn. 516. In that case the agreement was for the purchase of land for a specified price, of which \$500 was to be paid within a year, upon which payment the vendor was to execute a deed, and take back a mortgage for the unpaid residue of the purchase-money. No time was agreed on for the making of the deferred payments. This court refused a specific performance of the agreement upon the ground that its terms did not clearly appear, and that the court could not make a contract for the parties. "The parties agreed" (says the opinion) "that credit should be given for the remainder" of the purchase-money, "but the terms of such credit, whether it was to be for one, five or ten years, do not appear. That was evidently left for future negotiation. The court cannot supply the omission." But the case at bar is quite another thing. Here the express agreement was that the plaintiff should pay "from time to time"—that is to say, at such times and in such sums as he saw fit. There is no uncertainty here as to what the agreement of the parties was. It is to receive a reasonable construction. As the note and mortgage were, by their terms, paya-

ble on or before June 1, 1880, so that on that day they became due, and their holder was then entitled to his money. we think the reasonable construction is that the plaintiff was bound to pay the whole amount which he agreed to pay by that day. So far as time is concerned, his agreement was substantially that of the mortgagor, with a possible difference on account of his right to pay in such instalments as he saw fit. With this construction there is no uncertainty in the agreement which stands in the way of its specific performance.

From these views it follows that, in our opinion, the complaint states a cause of action and ground of relief, and that the demurrer was therefore properly overruled. The order overruling the same is accordingly affirmed.

WILLIAM SEARS vs. CHRIST WEMPNER and another.

27	351
76	122

November 29, 1880.

Receipt indorsed on Note.—An indorsement on a promissory note, "Interest paid to November 20, 1876," even though it be proved that a new note was at that date given for the interest, is in the nature of a receipt, and not of a contract, and may be contradicted or explained by parol.

Evidence held sufficient to sustain finding of fact.

Plaintiff brought this action in the district court for Wabasha county, to restrain the defendant Stahman from foreclosing by advertisement a mortgage upon several tracts of land belonging to defendant Wempner, on one of which the plaintiff held a second mortgage, the plaintiff alleging that sundry payments had been made by Wempner to Stahman, on the notes secured by the first mortgage, which payments had been indorsed on the notes, and that some of those notes had been paid in full, and that defendant Stahman, in his notice of foreclosure, ignored those payments, and claimed a

much larger sum than that actually due. The action was tried by *Mitchell, J.*, who found the facts in substance as follows: On November 20, 1871, Wempner made and delivered to Stahman his seven promissory notes, with 12 per cent. interest, payable annually, and, to secure payment of the notes, executed and delivered to Stahman a mortgage on the land described in the complaint. On November 1, 1876, there was due, and to become due on November 20, 1876, interest on the notes and mortgage, with a small balance of principal of one of the notes (a note for \$100,) amounting in all to \$465. To adjust this interest and balance of principal, Wempner, on November 1, 1876, executed and delivered to Stahman his note for \$465, due one year from date, with 12 per cent. interest, on the receipt of which note, and for no other consideration, Stahman surrendered the \$100 note, and indorsed on the others the following: "Interest paid to November 20, 1876." On November 1, 1878, a similar transaction took place as to the interest due and to become due on November 20, 1878. Wempner, being unable to pay all the interest, gave a note for \$80, due in one year, with 12 per cent. interest. This note was given to adjust the interest on the mortgage, and on receiving it, and the balance of the interest in cash, Stahman indorsed each of the notes as follows: "Interest paid to November 20, 1878." Neither the \$465 note nor the \$80 note was given or received as payment of interest due on the mortgage debt, but they were both given and received with the understanding that they should be and remain a part of the debt secured by the mortgage, and that they should be secured by the mortgage.

The court also found that the amount claimed by Stahman in his notice of foreclosure and sale (which included the amount due on the \$465 note and the \$80 note, without interest) was actually due, and ordered judgment for defendant, which was entered, and the plaintiff appealed.

C. H. Benedict and Chas. E. Flandrau, for appellant.

Stocker & Matchan, for respondent Stahman.

GILFILLAN, C. J. The indorsement on each of the several notes held by the defendant Stahman against defendant Wempner, and secured by the mortgage, "Interest paid to November 20, 1876," was in the nature of a receipt, and not of a contract, and might be contradicted or explained by parol. This being so, the only question in the case is whether the evidence sustains the finding of fact by the court below. The evidence furnished by the indorsements that the note then given for the interest was in payment of such interest, so as to extinguish that part of the indebtedness evidenced by the notes, is strong. But the evidence of Stahman, that it was not given or received in payment, is direct and explicit, and not contradicted except by the indorsements, thus producing a conflict in the evidence which was for the court trying the question of fact to determine. We cannot disturb that determination.

Judgment affirmed.

WILLIAM W. HOLCOMBE vs. JOHN A. JOHNSON.

December 1, 1880.

Act of Receiver under Erroneous Order of Appointment.—An order made by a district judge, upon a disclosure in proceedings supplementary to execution, appointing a receiver of certain specific property of the judgment debtor, is an adjudication that such property is not exempt property, and protects the receiver for acts done under it and in conformity therewith, though afterwards reversed for error in such adjudication.

By an order in supplementary proceedings in an action by one Umland against William W. Holcombe, the defendant in this action, John A. Johnson, was made receiver of the rents of part of a building belonging to Holcombe. On appeal to this court, that order was reversed on the ground that the property was Holcombe's homestead. See *Umland v. Holcombe*, 26 Minn. 286. This action was brought in the district

court for Washington county to recover rents received by Johnson prior to the reversal. In his answer the defendant pleaded his appointment as receiver, and that the rents collected by him had been paid over, pursuant to the directions of the order appointing him, prior to the reversal of that order in this court. A demurrer to the answer was overruled by *Crosby, J.*, and the plaintiff appealed.

McCluer & Marsh, for appellant.

O. H. Comfort and *Chas. E. Flandrau*, for respondent.

CORNELL, J. The only objection made to the order under which defendant acted is that the property of the judgment debtor, in respect to which said defendant was appointed a receiver, was in fact exempt property, and therefore not liable to be taken and applied towards the satisfaction of the judgment mentioned in the order. Whether it was exempt or not was a question which the judge was authorized to consider and determine upon the facts presented by the disclosure, and in the exercise of the jurisdiction over the supplementary proceedings which was clearly vested in the district court. Having such authority, an erroneous ruling of the question would be simply a mistake or error committed in the exercise of its jurisdiction, to be remedied on appeal. It would not render its decision void for want of jurisdiction. Such being the character of the order in this case, it was valid until reversed, and furnished full protection to the defendant for acts done under it and in strict conformity with its requirements while it remained in force.

Order affirmed.

SARAH P. BUTLER *vs.* TRUSTEES OF FIRST PRESBYTERIAN
CHURCH OF MINNEAPOLIS and others.

December 1, 1880.

Devise—Erroneous Description of Property rejected.—A testator devised to his widow "the house where we now live, with the grounds connected therewith, being lots 1, 2, and 3, and two-thirds of lot 4, in block 225, situate at the junction of Eighth and Helen streets, in the city of Minneapolis." The lots mentioned were not situated at the junction of Eighth and Helen streets, but at the junction of Eighth and Minnetonka streets. Those lots would take only a part of the house, which was situated on lots 4 and 5, at the junction of Eighth and Helen streets. The testator did not own lot 1, and had conveyed (subject to a condition of forfeiture, as is claimed,) the one-third of lot 2 next lot 1, but did own lots 3, 4, and 5, and the two-thirds of lot 2 next lot 3. *Held*, that the description by the numbers of the lots was a mistake, and must be rejected.

Appeal by plaintiff from an order of the district court for Hennepin county, *Young, J.*, presiding, refusing a new trial.

Woods & Babcock, for appellant.

Lochren, McNair & Gilfillan, for respondents.

GILFILLAN, C. J. The description of the property devised in the will of her husband, under which plaintiff claims, is as follows: "The house in which we now reside, with the grounds connected therewith, being lots 1, 2, 3, and two-thirds of lot 4, in block 225, situate at the junction of Eighth and Helen streets, in said city of Minneapolis." A part of this description is a mistake. Thus, taking the description, "being lots 1, 2, and 3, and two-thirds of lot 4," as the description intended, it is not true that the property is situate at the junction of Eighth and Helen streets, but it is situate at the junction of Eighth and Minnetonka streets; and it is not true that the house is included, for the house is situate on lots 4 and 5, which is at the junction of Eighth and Helen streets; and the description by the number of the lots would take only a portion of the rear part of it, but would not take any of what appears to be the front and main part of the

house. Which is the true description of the property intended to pass—that as “the house in which we now reside, with the grounds connected therewith, situate at the junction of Eighth and Helen streets,” or that as “lots 1, 2, and 3, and two-thirds of lot 4?” Which elements of description are to be rejected as mistaken?

As to this there can be little doubt. In the first place, it is apparent the deviser intended to leave to his widow the homestead, consisting of the house and grounds connected with it. He could hardly have been mistaken when he expressed that intention. But it is easy to see how he might mistake as to the numbers of the lots connected with the house. Without the plat before him, he might be mistaken as to which way the numbers of the lots 1, 2, 3, etc., ran,—whether from Helen towards Minnetonka street, or the reverse; and in this is the mistake which he evidently made. No reason can be conceived for his dividing the house by a line running through the rear part of it, and giving to his widow only the rear instead of the whole of it. Besides, it appears that the deviser owned lots 3, 4, and 5, and the two-thirds of lot 2 lying on the side towards the house, but did not own lot 1, and had conveyed, with a condition for forfeiture, (as plaintiff claims,) the other third of lot 2. As between two inconsistent descriptions, one of which covers land that he owns, and the other of which includes land that he does not own, if there be nothing else to determine which is the true one, it must be presumed that a grantor intends the former and not the latter. The description of the lands connected with the house as lots 1, 2, 3, etc., is a manifest mistake, and must be rejected. Plaintiff, therefore, has no title to the land in question in this action.

Order affirmed.

HENRY A. FELTUS *vs.* HENRY BALCH and another.

December 1, 1880.

New Trial—Surprise.—Order denying a motion for a new trial, made upon the ground of alleged surprise, which ordinary prudence could not have guarded against, sustained.

Appeal by defendants from an order of the district court for Hennepin county, *Young, J.*, presiding, refusing a new trial.

Benton, Benton & Roberts, for appellants.

Wilson & Lawrence, for respondent.

BERRY, J. Upon a careful consideration of the affidavits in this case, we are of opinion that the action of the district court in refusing the new trial asked for cannot properly be disturbed. The case had, it seems, been twice continued at defendants' instance; so that it was reasonable to expect that the plaintiff would have it brought on for trial at an early opportunity. We discover no reason for supposing that the court abused its discretion, or was arbitrary or oppressive, in setting the case down for trial on the third day of the term. This was something which might well be expected to occur, especially in view of the delay which had already taken place. Ordinary prudence required that the defendants should be prepared for such an emergency, and that when the calendar was called at the opening of the term, for the purpose, among other things, of making arrangements for the disposal of the cases, they should be represented by some one who could attend to their case, so that they could be ready for trial when the day appointed arrived or as soon thereafter as the case was reached.

Order affirmed.

F. H. PENFIELD *vs.* JAMES WHEELER and others.

December 1, 1880.

Order introducing a New Party.—Where a complaint stating no cause of action or ground of relief against a particular person is not so amended as to do so, an order making such person a party defendant, and requiring him to appear and answer such complaint, is erroneous.

Appeal by defendant Ralph J. Wheeler from an order of the district court for Washington county, Crosby, J., presiding, discharging an order to show cause, the nature of which is stated in the opinion.

J. N. & I. W. Castle, for appellant.

Comfort, Gregory & Comfort, for respondent.

BERRY, J. This action was commenced against James Wheeler and W. H. H. Wheeler, alleged to be partners under the firm name of Wheeler Bros. These two defendants answered, alleging, among other things, that the partnership was composed of themselves and Ralph J. Wheeler. Thereupon the plaintiff, upon an *ex parte* application to the district court, obtained an order that Ralph be made a party defendant in the action, and that he appear and answer the complaint within twenty days after the service of such order upon him. Upon the application of Ralph, specially appearing for that purpose, the plaintiff was ordered to show cause why the order making Ralph a party, etc., should not be vacated. Upon a hearing, the order to show cause was discharged. As the complaint stands, it neither states nor assumes to state any cause of action or ground of relief against Ralph. There is, therefore, no reason why he should be made a party to the action, or be required to appear therein or answer the complaint. If the plaintiff desired to bring him in, he should first have amended his complaint and summons, either before obtaining the order, or under its direction.

The order discharging the order to show cause is reversed, and the order making said Ralph a party, and requiring him to appear and answer, is vacated.

JOHN JENICKE *vs.* MINNEAPOLIS & ST. LOUIS RAILWAY
COMPANY.

December 1, 1880.

Evidence considered, and *held* insufficient to sustain the verdict.

Appeal by defendant from a judgment of the district court for Scott county, *Macdonald*, J., presiding, refusing a new trial.

L. L. Baxter, for appellant.

L. M. Brown, for respondent.

GILFILLAN, C. J. There is no evidence that the plaintiff's horse was killed by defendant. All that is shown is that she was found dead near defendant's track, without any wounds upon her or appearance of any collision, except an old wound which she had received by running against a fence. It is incredible that a train of cars should have come in collision with and killed her, without leaving any mark upon her. Such a thing might be possible, but it is so highly improbable that, in the absence of any marks of a collision, the mere fact of her being found dead near the track is no ground for inferring that she was killed by a passing train.

Judgment reversed, and new trial ordered.

**BRUNO SCHUBERT vs. MINNEAPOLIS & ST. LOUIS RAILWAY
COMPANY.**

December 1, 1880.

Railroad Co.—Duty to adjacent Land-Owner, where road is not fenced.—A railroad company which has failed to fence its road, as required to do by statute, must run its trains upon the basis that cattle rightfully upon adjoining lands may stray upon the track, on account of the absence of a fence. The adjoining land-owner is not to be deprived of the use of his land by the failure of the company to fence, and in using the same he has a right to expect this course of conduct on the part of the company.

Same—Contributory Negligence of Land-Owner.—Whether, in exercising his right to use his land, the land-owner has been guilty of negligence, contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case, and the duty of the company as above indicated. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the land-owner, in law, notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet.

Appeal by defendant from a judgment of the district court for Carver county, *Macdonald, J.*, presiding.

L. L. Baxter, for appellant.

S. Fowler, for respondent.

BERRY, J. The defendant's railroad, where it ran through plaintiff's land, had not been fenced, as required by Gen. St. 1878, c. 34, § 54. Section 55 of that chapter provides that "all railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies; and a failure to build and maintain cattle-guards and fences, as above (viz., in section 54,) provided, shall be deemed an act of negligence on the part of such companies." Plaintiff turned his cow upon his land to graze, and to drink at a spring thereon, and, between 11 and 12 o'clock in the forenoon, having passed from the land upon defendant's track, she was struck by a passing train and injured. If the defendant's road had been fenced, there is no reason for

supposing that the cow would have been upon the track. The liability of the defendant for the injury, as the result of the negligence imputed to it by the statute, is clear, unless there was contributory negligence on the part of the plaintiff. *Whittier v. Chicago, Mil. & St. Paul Ry. Co.*, 24 Minn. 394.

The plaintiff certainly has a right to use his land, and he is not to be deprived of this right by the defendant's failure to do its duty by fencing. If the defendant will persist in running its trains without complying with the fence law, it must run them upon the basis that cattle, rightfully upon adjoining lands, may stray upon the track on account of the absence of a fence. In other words, the defendant must run its trains with reference to the fact that such cattle are exposed to injury through its own negligence, and with a degree of care reasonably proportionate to the risk of such exposure. The owner of the land has a right to expect this course of conduct on the part of the defendant, and to act accordingly. Whether, in exercising the right to use his land, the owner has been guilty of negligence contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case, and the duty of the defendant, as above indicated. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is certainly not such negligence on the part of the land-owner, *in law*, notwithstanding defendant's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. In this view of the law, we see no reason for disturbing the verdict in this case. The negligence of the defendant in failing to build and maintain the fence is clearly established, and the jury were justified by the evidence in finding no contributory negligence on the part of the plaintiff.

Judgment affirmed.

CHARLES A. SUTTON *vs.* HENRY D. WOOD.

December 3, 1880.

Estoppel—Admission.—No estoppel can be created out of an admission made without any fraudulent purpose, and which, from its nature and the circumstances under which it was made, involves no culpable negligence on the part of the one making it.

Appeal by defendant from a judgment of the municipal court of Minneapolis. The action was replevin for one set of double harness, the defence was title and right of possession in defendant, and the trial was by the court, whose findings were, in substance, as follows. On January 5, 1880, the plaintiff presented to defendant the following order: "Mr. Wood: Please to deliver my harness to Mr. C. A. Sutton, and you will oblige, yours truly, A. G. Wendell." The defendant read the order, told plaintiff that he had no claim to the harness, and that if plaintiff would call at noon of that day, he (defendant) would deliver to him the harness. Plaintiff then went to Wendell, and bought the harness, taking a bill of sale thereof. At the time appointed plaintiff called on defendant and demanded the harness, which defendant refused to deliver. Some three months prior to January 1, 1880, Wendell, owning a team and the harness in question, sold the team to defendant. Thereupon one Laramee, a creditor of Wendell, asked defendant if he would not buy the harness. The defendant said he would, and that he would give \$40 for it. Laramee then went to Wendell, and told him of defendant's offer, and was told by Wendell to sell the harness to defendant for \$40, if he could not get more. Laramee then sent word to defendant that he could have the harness for \$40, and defendant took and retained possession thereof. Laramee credited Wendell on his account with the price of the harness, and charged the harness to defendant.

As a conclusion of law, the court held that defendant, by his statement to plaintiff that he had no claim on the har-

ness, and would deliver it to plaintiff at noon, if he would come for it, was estopped from claiming ownership of the harness when the plaintiff went after it at noon, as the plaintiff had, in good faith, acted on the statement and bought the harness of Wendell. Judgment was accordingly ordered and entered for plaintiff for the value of the harness, and the defendant appealed.

Koon, Merrill & Keith, for appellant.

George R. Robinson, for respondent, cited *Rice v. Dewey*, 54 Bart. 455; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Dezell v. Odell*, 3 Hill, 215; *Reynolds v. Lounsbury*, 6 Hill, 534; *Presbyterian Congregation v. Williams*, 9 Wend. 147; *Stonard v. Dunkin*, 2 Camp. 344; *Chapman v. Searle*, 3 Pick. 38; *Morrison v. Blodgett*, 8 N. H. 238.

CORNELL, J. To give to the conduct or admission of a party the character and effect of an estoppel, it must have been fraudulent in its purpose, or, in the absence of any such express intention, so directly unjust in its result as to make out against him a clear case of culpable negligence in not having contemplated it as the natural consequence of his admission. *Combs v. Cooper*, 5 Minn. 200 (254;); *Whitacre v. Culver*, 6 Minn. 203 (297;); *Same v. Same*, 8 Minn. 103 (133;); *Pence v. Arbuckle*, 22 Minn. 417; *Coleman v. Pearce*, 26 Minn. 123; *Andrews v. Lyon*, 11 Allen, 349; *Pierce v. Andrews*, 6 Cush. 4.

The case at bar presents neither of these elements. The admission relied on as an estoppel is not shown to have been made to mislead and induce the plaintiff to make the purchase he afterwards did, or with any fraudulent purpose whatever. No reference was made to any purchase. Defendant had no knowledge or intimation that one was contemplated, or that plaintiff was in any way interested in learning from him the ownership of the property. It is not even shown that the plaintiff at the time had any intention of buying the property, or that such an intention was suggested to him by the admission or anything that there occurred. No fault can be

attributed to defendant on the ground of negligence, for he had no reason to suppose that his statement as to the ownership of the property would influence the plaintiff to buy it; and the nature and circumstances of the admission were not such as would naturally, or even probably, tend to that result.

Judgment reversed.

27 364
80 124

CITY OF ST. PAUL vs. FRANK SMITH.

December 27, 1880.

City Ordinance regulating Hacks at Railroad Stations.—The charter of the city of St. Paul authorizes the common council, by ordinances, "to regulate, and at a reasonable rate to license, hacks, carts, omnibuses, trucks, wagons, and other vehicles engaged in hauling or carrying for hire, and the charges of the drivers of such vehicles." *Held*, that the following ordinances are authorized by this provision of the charter, viz: Ordinance 107, which provides "that hackmen, * * * when at or about any railroad depot or station, * * * shall obey the commands and directions of the police officer or officers who may be stationed or doing duty at or about such depot or station * * * for the preservation of order and enforcement of ordinances;" and ordinance No. 133, which provides that "no owner or driver of any * * * hack * * * shall make any stand or stopping-place, with or without his vehicle, while waiting for employment at any place on any street or public ground adjacent to any railroad or railway depot, * * * except in the place or places designated by the police officer on duty, from time to time, at such railway depot or station." *Held*, that these ordinances are regulations of hacks, and not unreasonable or oppressive; also, that ordinance No. 133 authorizes the assigning of a particular place to each hackman; also, that the fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen for the purposes mentioned in the ordinances is sufficient.

Certiorari to the municipal court of St. Paul, where the defendant was convicted and fined for a violation of the ordinances mentioned in the opinion.

W. P. Murray, for plaintiff.

S. L. Pierce, for defendant.

BERRY, J. Subdivision 11, subchapter 4, of the city charter of St. Paul, (Sp. Laws 1874, c. 1,) authorizes the common council, by ordinances, resolutions, or by-laws, "to regulate, and at a reasonable rate to license, hacks, carts, omnibuses, trucks, wagons, and other vehicles engaged in hauling or carrying for hire, and the charges of the drivers of such vehicles." Under this authority the common council passed two ordinances, Nos. 107 and 133. No. 107 provides "that hackmen, * * * when at or about any railroad depot or station, * * * shall obey the command and directions of the police officer or officers who may be stationed or doing duty at or about such depot or station * * * for the preservation of order, and enforcement of ordinances." No. 133 provides that "no owner or driver of any * * * hack * * * shall make any stand or stopping-place, with or without his vehicle, while waiting for employment at any place on any street or public ground adjacent to any railroad or railway depot, * * * except in the place or places designated by the police officer on duty, from time to time, at such railway depot or station." These provisions of the ordinances named were, in our opinion, authorized by the charter provision above quoted, giving authority, among other things, to regulate hacks. That they are *regulations* of hacks is apparent, and in our opinion they are not unreasonable or oppressive. It is a matter of common knowledge that at and about the hours of the arrival and departure of passenger trains, confusion and disorderly brawling and breaches of the peace are very apt to occur at and about depots and stations in considerable towns, especially among those who are engaged in carrying passengers and baggage to and from such depots and stations. The only efficient preventive or remedy in the premises appears to be to put a police officer upon the spot, whose duty it shall be to enforce such applicable ordinances as the city council, in the exer-

cise of chartered power, may have seen fit to adopt. This seems to be the general if not universal practice in all large cities and towns. As it is manifestly impracticable and impossible to define minutely every case of disorder or confusion, it is proper—in fact, it is necessary—that the officer on duty should be invested with some general authority to preserve order, and thus determine on the emergency what acts are disorderly or likely to lead to disorder, though, of course, this authority would not justify him in arbitrary or unreasonable action. Upon these grounds we think the ordinances in question valid and justifiable. The assigning of a particular place to each hackman would appear to be peculiarly and happily adapted to the preservation of order. By this practice every one is informed exactly where his proper place is, so that the strife and contention for particular places which would otherwise ensue is measurably, at any rate, prevented. The authority thus to assign places must necessarily be committed to some officer, and for obvious reasons it is very properly committed to the policeman on duty at the depot or station. As in the other case mentioned, this authority should, of course, be exercised with fairness to all concerned. The fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen in their business, for the purposes mentioned in the ordinances, is sufficient.

Judgment affirmed.

PATRICK WALSH vs. ST. PAUL & DULUTH RAILROAD COMPANY.

December 27, 1880.

Duty of Servant to observe Dangers in his Employment.—In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar laws of gravitation, and to govern himself accordingly. If he fails to do so, the risk is his own. If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, though not aware of the degree of defectiveness, he is bound to use his eyes to see that which is open and apparent to any person using his eyes, and, if he fails to do so, he cannot charge the consequences upon his master.

Appeal by plaintiff from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial. The case is stated in the opinion.

S. L. Pierce, for appellant.

The negligence of Brown (who had charge of the warehouse) was the negligence of defendant, since Brown was defendant's representative in that department of its business. As the risk in this case was of a special nature, not patent in the work, and of which plaintiff was not cognizant, it was Brown's duty specially to notify him of the risk. *Lake Shore & Michigan Southern R. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Hough v. Railway Co.*, 100 U. S. 213. Whether the plaintiff did or did not understand and appreciate the danger of removing the millstone, with the number of servants furnished and his inexperience, was a question peculiarly for the jury. *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Detroit & Milwaukee R. Co. v. Van Steinburg*, 17 Mich. 99; *Mayo v. Boston, etc., R. Co.*, 104 Mass. 137; *Stoddard v. St. Louis, etc., Ry. Co.*, 65 Mo. 514; *Greenleaf v. Railroad Co.*, 29 Iowa, 14. Plaintiff acted under orders of the defendant or its representative given upon the spot, which he had a right to suppose would not have been given if it was considered unsafe for him to follow them. *Walsh v. Peet Valve Co.*, 110

27	367
47	364
27	367
68	186
27	367
76	172
27	367
80	81

27 367
86 239

Mass. 23; *Chicago & Northwestern Ry. Co. v. Bayfield*, 37 Mich. 205; 2 Thompson on Negligence, 974.

James Smith, Jr., for respondent.

BERRY, J. The plaintiff was employed by defendant to work in and about its warehouse or freight depot. He testifies in one place that he was employed "to handle freight—load and unload—whatever there was to be done around;" and again, that he "had to handle boxes and sacks and everything else;" and again, in answer to the question "You were employed to do whatever freightage was done either in loading or unloading cars?" he replied, "Yes, sir, anything, anything. I handled all kinds of freight, and that was what I was employed for." It appeared from his testimony that he commenced working in the warehouse about six years before the action hereinafter mentioned; that for four years before the accident he had not been away from it "any length of time," and that at the time of the accident he was 25 or 26 years of age. While engaged with other employes of defendant in moving a millstone from the scales in the warehouse to a car standing by the outside platform of the warehouse, he received the injury for which he seeks to recover damages in this action. The stone weighed from 1,500 to 2,000 pounds, and, being a top stone, it had a "bulge" on one side, the other being flat. The floor of the warehouse and of the platform at the place where the stone was rolled on its way to the car was uneven.

The plaintiff claims that the moving of a stone of this kind and weight, with safety to the persons moving it, requires in such persons, or at least in some person under whose immediate and personal direction it is done, experience in doing that particular kind of work; that on account of the great weight, the round form, and the bulge upon one side, dangers attend the moving of such stones, which none but such an expert can be expected to be acquainted with. He also claims that they cannot be moved over an uneven surface without great danger to the persons moving them, and,

further, that to move them with safety to such persons more men are required than were actually engaged in moving the stone in question. The plaintiff claims that defendant was guilty of negligence in failing to furnish men or a foreman of experience, in failing to furnish a sufficient number of men, and in furnishing an uneven floor; and that, in consequence of such negligence, the stone, while being moved, fell upon him and occasioned the injury complained of. The plaintiff introduced evidence tending to show all the omissions charged as negligence on the part of the defendant; but, at the close of the testimony upon his part, the court, upon defendant's motion, dismissed the action, upon the ground that the evidence did not tend to establish a cause of action.

In our opinion this was entirely proper. As to the unevenness of the floor, it appeared affirmatively that plaintiff was aware that it was uneven, and, though he were not (as he testifies) aware of the degree of its unevenness, this was a matter so open to ocular observation that, in consequence of the length of time during which he had been engaged in handling freight of all kinds in this very warehouse, he would stand in no better position than if he had actual knowledge of it as it really was. He was bound to make use of his eyes to see a source of danger which was open and apparent to anybody who would use his eyes. He was not a child, but had presumably reached years of discretion. As to the danger and difficulty of handling the stone on account of its weight and form, and of the bulge which made it heavier on one side than the other, this is a danger and difficulty which arises from the ordinary operation of familiar laws of gravitation, and from nothing else.

With this ordinary operation of the laws of gravitation every man who has reached the age of twenty-five years, and of ordinary capacity, must be presumed to be acquainted, especially if for years he has been engaged in handling freight of all kinds about a railroad warehouse. If, then, he engages

in moving a millstone, as in this case, the form, bulge, and great weight of which are inevitably apparent, he must take notice of the ordinary operation of familiar laws of gravitation, and therefore must, so far as the observation of these laws is concerned, see to it that he engages in moving it with help sufficient in number to move it with safety. Failing to do so, the risk is his own, and not that of his employer.

On any other basis than this, it would be impracticable to carry on any extensive business like that of railroad corporations. Unless it affirmatively appears that a master knows or ought to have known that an employe, on account of immature age, or some incapacity, cannot reasonably be expected to possess ordinary common sense and judgment, it must be presumed that the employe does possess them, and will to a reasonable extent act accordingly, and any neglect or failure to do so must be regarded as a risk of the employment, which the employe takes upon himself. Even if he were directed (as it is claimed the plaintiff was in this case) by a fellow employe, holding a position over him, to move the stone without help sufficient in numbers to enable it to be done with safety, this would not alter the result. The negligence of such an employe would be the negligence of a fellow-servant, for the consequences of which the principal would not be liable. *Brown v. Winona & St. Peter R. Co. ante*, p. 162.

Upon these grounds, we are of opinion that the action was properly dismissed.

Order affirmed.

MARTIN BOICE *vs.* HOWARD V. BOICE.

37	371
40	308

December 27, 1880.

Chattel Mortgage—Law impairing Obligation of Contract.—The right of a chattel mortgagee, under a clause in his mortgage, to take possession of and sell the mortgaged property, in case he shall at any time deem himself insecure, is a contract right, and therefore not to be impaired by subsequent legislation, like Laws 1879, c. 65, § 2.

Evidence *held* sufficient to support the findings in this case.

Replevin for two mares, taken from plaintiff's possession by defendant as mortgagee in a chattel mortgage. A jury was waived, and the cause set for trial by *Farmer, J.*, on June 4, 1880, the fourth day of the term of the district court for Fillmore county. On that day the cause was not reached, (the court being engaged in trying another action,) but was brought on for trial on the following day. On that day the attorney of record for plaintiff was not present, and, without making affidavit for a postponement of the trial, plaintiff employed other counsel, and the cause was tried and submitted. A decision having been filed, and judgment ordered for defendant, plaintiff moved for a new trial, on the affidavit of his attorney of record, stating that on the evening of June 4th such attorney returned from Preston (where the court was held) to his home at Lanesboro, a distance of eight miles, as was his custom when attending the term of court, owing to the difficulty in obtaining suitable lodging at Preston; that on the night of the 4th and morning of the 5th, the country about Preston and Lanesboro was visited by a violent storm, which caused the streams to overflow, whereby bridges were carried away and the roads (including the railroads) between Lanesboro and Preston were rendered impassable, and the attorney was unable to reach Preston or attend the trial. The affidavit further stated that the counsel who appeared for plaintiff had not the opportunity to acquire the full knowledge of the facts and circumstances surrounding the case,

without which it could not be intelligently tried or fairly decided, and that the affiant has discovered from the reporter's minutes of the trial that the main facts necessary to be established on the part of the plaintiff, in order to make applicable the legal points principally relied on, were not proved, nor was any evidence given thereon. The affidavit did not state what the facts were which were thus left unproved, nor the evidence by which they could have been proved. The motion was denied, the court holding, on consideration of the affidavit and the evidence given at the trial, that the real issue in the case was whether a certain land-contract was given in satisfaction of the mortgage, or merely as collateral security; that as both plaintiff and defendant testified to and fully disclosed the whole transaction between them, and Mr. Colburn, the only other person present when their agreement was made, also testified clearly in corroboration of the testimony of the defendant, and as the chattel mortgage was not satisfied nor any indorsements made upon it, there was no likelihood that the strong preponderance of evidence in favor of defendant could be overcome if a new trial should be granted. Judgment was accordingly entered for the defendant, and the plaintiff appealed.

E. N. Donaldson, for appellant.

N. P. Colburn, for respondent.

BERRY, J. The plaintiff's application for a postponement of the trial of this action was addressed to the discretion of the district court. So far as the motion for a new trial was based upon the refusal to grant this application, and the alleged consequences of the same, we think, without entering into details, that the district judge assigns very satisfactory reasons why a new trial should not be granted. As to the merits, the court was amply justified by the evidence, especially by the testimony of Mr. Colburn, in finding that the so-called land agreement was merely an additional security for the debt covered by the chattel mortgage, and was not intended to operate as a release of the mortgage, or to affect

the defendant's rights thereunder. If this is so, it follows that the land agreement did not, as plaintiff's counsel contends, "merge or extinguish" the mortgage, or extend the time of its payment.

The chattel mortgage contains a clause authorizing the mortgagee to take possession of the mortgaged property and sell it in case he "shall at any time deem himself insecure." This is the clause under which the defendant, the mortgagee, claims in his answer to have taken the property. The clause conferred a valid authority, and there is testimony in the case reasonably tending to show that defendant acted under it in taking the property, and therefore to sustain the finding that it was taken under and by virtue of the mortgage. The right of the mortgagee under this clause, being a contract right, could not be impaired by legislation subsequent to the execution of the mortgage. For this reason, if for no other, it is not affected by Laws 1879, c. 65, § 2, cited by plaintiff.* It would also seem that there was evidence going to show that of the amount secured by the mortgage at least one year's interest of the principal debt was due and unpaid at the time when the property was taken by the defendant, so that, to that extent, there was a default in the performance of the conditions of the mortgage, upon the occurrence of which the mortgagee was authorized, as is usual, to seize and foreclose.

Judgment affirmed.

*This act is entitled "An act in relation to chattel mortgages," and section 2 reads as follows: "No mortgagee, nor any one claiming under him, shall have any right arbitrary or without just cause based upon the actual existence of facts, to declare any of the conditions or stipulations of a mortgage broken prior to the time of default in the payment of such mortgage, or prior to the time when the conditions of such mortgage should be performed."—[REPORTER.]

SUMNER A. SHEFFIELD vs. JOHN MULLIN, Administrator, and others.

December 27, 1880.

Evidence *held* sufficient to sustain finding of referee.

Plaintiff, surviving partner in the firm of Brandt & Co., composed of plaintiff and Charles Brandt, brought this action in the district court for Rice county against the defendant Mullin as administrator, and the other defendants, who are the widow and children, of Charles Brandt, alleging that during the lifetime of Charles Brandt, the business of the firm (which was the manufacture and sale of lager beer at Fari-bault, in Rice county) was managed by Brandt as the active partner, the plaintiff being a resident of California, and unable to give it any personal attention. That on Brandt's death he was indebted to the firm for beer furnished him in his individual business as a retailer, and the firm itself was indebted in an amount exceeding the salable value of its assets, which consisted principally of its brewery and the machinery and vessels and material used in the business, and the land on which the brewery stood. That the plaintiff, still continuing to reside in California, and unable to give his personal attention to the winding up of the business, employed as his agent for that purpose his brother M. B. Sheffield, a competent person, at a salary of \$1,500 per year, which plaintiff has paid him. That the plaintiff was unable to effect a sale of the property, and as interest was constantly accruing on the firm indebtedness, and the business, if carried on, would more than pay expenses, while the property would deteriorate if suffered to lie idle, the business has been carried on down to the commencement of the action by plaintiff as surviving partner; that such business has paid all expenses, including the agent's salary, and that the assets and debts of the late firm continue substantially the same as at the date.

of the death of Brandt. That there appears to be no probability of finding a purchaser for the property at a price satisfactory to all parties, and it is for the interest of all parties that the property be sold and the partnership affairs settled. Judgment is demanded that a receiver be appointed, the property sold, for an accounting, etc.

At the trial, before a referee, the plaintiff put in evidence the books of the firm and an account (Exhibit K) showing payments to the agent M. B. Sheffield on account of salary, and the agent also testified on the subject. By this evidence (which the statement of case certifies to be "all the evidence on the subject of the amount which has been paid or received by M. B. Sheffield on his salary, and all moneys paid him by the concern or taken by him from the business or moneys of the copartnership for or on account of salary,") the total amount of money received by the agent for salary was \$3,129.50. The testimony of the agent on this point was "the firm has paid my salary and all expenses for running the business which have been paid. The payment of salary and expenses were paid out of the profits of the business."

The referee found, among other things, that plaintiff had paid the agent M. B. Sheffield a salary of \$1,500 per year from the death of Brandt (December 6, 1875) to June 1, 1880, and that the same had been paid out of the profits of the business; but that M. B. Sheffield's services were worth but \$480 per year, and any payment to him out of the company funds in excess of that sum was unauthorized and should be accounted for by plaintiff. He also found certain sums due by plaintiff and defendant respectively to the firm, which should be paid, and ordered judgment that a receiver be appointed, the property sold, etc. Judgment was entered accordingly, and plaintiff appealed.

Gordon E. Cole, for appellant.

By the uncontradicted testimony M. B. Sheffield has been

paid out of the proceeds of the business, to apply on his salary, \$3,129.50 and no more. But the referee finds he has been paid from December 6, 1875, to June 1, 1880, (four years and six months.) at the rate of \$1,500 per year—that is, that he has been paid \$6,750. All in excess of \$3,129.50 is error, and to that extent the judgment should be modified.

John H. Case, for respondents:

The plaintiff in his complaint alleges that M. B. Sheffield has been paid his salary at the rate of \$1,500 per year, and that this salary has been paid out of the profits of the business, and the agent testifies to the same effect.

BERRY, J. It is of course possible that the referee may have fallen into the mistake attributed to him by the plaintiff, but there is certainly evidence which has a reasonable tendency to sustain his finding. While in such circumstances it is not necessary to indulge in conjectures, it occurs to us that while Exhibit K and the firm books contained—as the agent testified—a true statement of all moneys taken out by him for his salary, it may be that he had received things other than money, sufficient, when added to the money payments, to discharge his entire salary. We see no sufficient reason for disturbing the finding, and the judgment is accordingly affirmed.

27	376
44	599
27	376
58	370

27	376
86	515

JOHN L. DODGE and another *vs.* LORENZO ALLIS, impleaded, etc.

December 28, 1880.

Final Decree in Foreclosure Suit—Appeal—Matters reviewable.—An appeal may be taken, as from a judgment, from the “final decree,” in an action to foreclose a mortgage entered pursuant to Gen. St. 1878, c. 81, § 36. Upon such appeal no alleged error in the judgment directing a sale under section 29, c. 81, can be reviewed. To obtain a review of that judgment, an appeal must be taken from it.

Same—May vest title in Mortgagor—Presumption as to Redemption.—When the application for the "final decree" is made by the purchaser or his assigns, the court may at his request enter the decree vesting the title in any person the applicant may name. No party to the action can allege that as error, unless he shows that he was prejudiced by it. When, by request of the applicant, the title is vested in the mortgagor defendant, the court will not presume, in favor of a defendant claiming to be a purchaser from the mortgagor, subsequent to the mortgage, that there was an assignment by the purchaser to the mortgagor, such as to operate as a redemption.

Plaintiffs brought this action in the district court for Ramsey county to foreclose a real estate mortgage made by the defendant William F. Davidson, the defendant Allis being made a party as a subsequent purchaser from Davidson of an undivided moiety of the mortgaged property. The mortgage was made June 23, 1868, to secure an indebtedness, bearing interest at seven per cent., and was assigned to plaintiffs on September 13, 1873. The assignment was recorded November 30, 1874. Afterwards, by agreement between plaintiffs and Davidson, the time for payment of the mortgage debt was extended two years, and the rate of interest increased to ten per cent. per annum. The defendant Davidson made default. The defendant Allis, in his separate answer, alleged that on November 1, 1873, the defendant Davidson conveyed to him in fee an undivided moiety of the mortgaged premises, the conveyance being duly recorded on December 29, 1873, and prayed that the foreclosure and sale prayed for in the complaint be denied as to such undivided moiety, and that such undivided moiety be adjudged to be free and clear of the mortgage; and if such relief be denied, then that Davidson's undivided moiety be first sold, and for general relief.

The plaintiffs having moved for judgment on the pleadings, the defendant Allis urged that by the agreement extending the time for payment of the debt and increasing the rate of interest, the undivided moiety of the mortgaged property then owned by him was discharged from the lien of the mortgage. The court overruled the point, and ordered judgment for a

sale of the property to satisfy the mortgage debt with interest computed at seven per cent. per annum, and that Davidson's moiety be first sold, and that Allis's moiety be sold only to make up any deficiency existing in case the proceeds of the first sale should be insufficient to pay the amount due plaintiffs. In accordance with this order, judgment was entered on November 6, 1876, directing a sale of the property. The sales were made on December 23, 1876, Davidson's moiety being first sold, and, that proving insufficient to satisfy the mortgage debt, Allis's moiety was also sold, the plaintiffs becoming the purchasers at both sales, and receiving the usual certificate. The sheriff made due report of the sales, stating that plaintiffs were the purchasers, and on January 6, 1877, an order was made confirming the report.

On October 18, 1879, the plaintiffs filed an affidavit showing that no redemption had been made, and served notice on the attorneys for the various defendants (including Allis) that, on the records and files in the cause, the plaintiffs would make application on October 28, 1879, "for a final decree of foreclosure in said action, pursuant to the statute in such case made and provided." Pursuant to this notice application was made, and on October 28, 1879, a decree was granted, which recites that the sheriff, pursuant to the judgment, sold the mortgaged premises on December 23, 1876, "to William F. Davidson, in separate parcels," (which are particularly described,) "for the aggregate sum of \$42,717.21, as by reference to said report will more fully appear, the said William F. Davidson being the highest bidder," etc., and also recites the filing of his report by the sheriff, and its confirmation, on due notice, on January 6, 1877, and that more than one year has elapsed since the confirmation, and that it satisfactorily appears to the court that the premises have not been redeemed from the sale, and that no notice of intention to redeem has been filed in the court. After these recitals, the decree proceeds: "Now, on motion of Williams & Davidson, attorneys for plaintiffs, due notice of such motion

having been given, it is hereby adjudged and decreed that the title to said above-described premises is vested in said William F. Davidson or his assigns, free and clear of all equity of redemption of said defendant, or any parties in said judgment, or any person claiming under them since the commencement of this action." From this judgment the defendant Allis appealed.

Allis & Allis, for appellant.

A judgment of the district court, to be appealable, must be a final judgment—a judgment which is rendered upon the final determination of the action, and which must "specify clearly the relief granted or other determination of the action." Gen. St. 1878, c. 66, §§ 262, 263, 273; *Von Glahn v. Sommer*, 11 Minn. 132 (203;); *Lamb v. McCanna*, 14 Minn. 513; *Rogers v. Holyoke*, Id. 514; *Scarles v. Thompson*, 18 Minn. 316; *Ryan v. Kranz*, 25 Minn. 362; *Chesterson v. Munson*, 26 Minn. 303; 2 Dan. Ch. Pr. 1192–1204; 4 Wait Pr. 244; *Butler v. Lee*, 3 Keyes, (N. Y.) 70; *Adams v. Fox*, 27 N. Y. 640; *Tompkins v. Hyatt*, 19 N. Y. 534; *Cruger v. Douglass*, 2 N. Y. 571; *Jaques v. Methodist Church*, 17 John. 548; *Juan v. Ingoldsby*, 6 Cal. 439; *De Barry v. Lambert*, 10 Cal. 503.

The statute as to foreclosure by action provides that "judgment shall be entered, under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, and directing the sheriff to proceed and sell the same," and make report to the court. Gen. St. 1878, c. 81, § 29. Such judgment merely determines the amount of the mortgage debt and directs a sale. All other questions are reserved for the future action of the court. Thus, the first judgment cannot lawfully foreclose the defendants of their estate or equity of redemption in the premises sold. The statute gives a year from the sale in which to redeem, and section 36 provides for a "final decree" after the expiration of that period. Clearly, this decree is the final decree of foreclosure in cases under this statute, and there can be no doubt that an appeal lies from

this decree. And it is equally plain that no appeal lies from the judgment provided for in section 29, *as a judgment*; for, as a judgment, it is neither final nor complete, and therefore is not a judgment in the sense in which the word is generally used in our statutes, nor such a judgment as the statute authorizes an appeal from. It is strictly a mere interlocutory decree or judgment, or more properly, in the nomenclature of our statutes, an intermediate order. As "an order involving the merits of the action," it may be appealable, and as such it is also reviewable on appeal from the "final decree," which is the final judgment in the action. But if the first judgment is not reviewable on appeal from the final decree, yet on such appeal the court can review the decision and action of the court upon plaintiffs' motion for judgment on the pleadings; for such decision and order, though not themselves appealable, involved the merits and necessarily affected both the judgment of sale and the judgment or final decree of foreclosure, and are therefore reviewable on this appeal.

Counsel also argued that the court erred in directing a sale of the undivided moiety of Allis, and in not holding that such moiety was released from the lien of the mortgage by the agreement between plaintiffs and Davidson for an extension of time of payment of the mortgage debt; that Allis having purchased and taken his deed of his moiety for value and in good faith, he and his property stood in the relation of surety for Davidson, the mortgage debt being wholly and exclusively the debt of Davidson. *Brandt on Suretyship*, §§ 21, 22; *Lowry v. McKinney*, 68 Pa. St. 294; *Neimcewicz v. Gahn*, 3 Paige, 614, 642; *Johnson v. White*, 11 Barb. 194; *Jones on Mortgages*, §§ 722-734, 741, 742, *et seq.*

Williams & Davidson, for respondents.

GILFILLAN, C. J. Appeal from what the statute (Gen. St. 1866, c. 81, § 33; Gen. St. 1878, c. 81, § 36,) designates a final decree in an action to foreclose a mortgage. The objection is made, by motion to dismiss, that an appeal will not lie from such a decree; or, if one will lie, it must be

taken as from an order—within 30 days. Whether it is to be deemed a judgment or order, inasmuch as legal rights are or may be determined by it, there is undoubtedly a right of appeal; and, although it is not designated as a judgment but as a decree, as it has in its effect upon the matters determined by it, and in the mode of its entry, all the essentials of a judgment, it should be appealed from as such. The motion to dismiss is denied.

An important question in the case is, can this court, upon an appeal from the so-called "final decree," consider alleged errors in the judgment directing the sale, or must an appeal from that judgment be brought to secure a review of it? This must depend on the question which is to be deemed the final judgment determining the action, and settling the rights of the parties to it. The question is not difficult to answer. The judgment directing the sale (Gen. St. 1866, c. 81, § 26; Gen. St. 1878, c. 81, § 29,) adjudges the amount due, with costs and disbursements, and the sale of the mortgaged premises or some part thereof to satisfy said amount, and directs the sheriff to proceed and sell the same, etc. This judgment determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered, all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes. The "final decree" does not determine any issue, nor any of the merits between the parties, nor adjudicate any of the rights between them as parties, nor contain any provision which affects the relief to which the plaintiff is entitled. Before it can be entered, plaintiff must have got all the relief he is entitled to in the action. The property has been sold, and the proceeds are presumed to have been applied as directed by the judgment. It is not a judgment upon the matters involved in

the action. The application for the decree and the entering of it, though done in the action, is not a proceeding between the plaintiff and the defendants or any of them, or between any of the parties to the action, as parties. It is a proceeding on behalf of the purchaser, whoever he may be, as purchaser. The decree is for his benefit, and not for the benefit of any party to the action. Any controversy which may arise on the application must be between him and one or more of the parties. No controversy between the parties to the action, in their character of such parties, can then be determined. The provision for such a "final decree" may at first sight seem singular, yet it is undoubtedly a wise provision. It is intended to determine in the original action, as between the purchaser and all the parties to the judgment for the sale, that there has been no redemption, and to afford to the purchaser record evidence in the way of a decree or judgment, conclusive as to all the parties, that the title is in the purchaser free from any right to redeem. On an appeal from the "final decree" no error can be alleged against the judgment for a sale. To review that judgment an appeal must be taken from it.

The judgment for the sale was entered November 6, 1876, the sale under it made December 23, 1876, and the report of sale was confirmed January 6, 1877. As appears by the report, the plaintiffs in the action were the purchasers. Application by plaintiffs for the final decree was noticed for October 28, 1879, long after all rights of redemption were barred by lapse of time. The decree was entered the same day. The decree is, of course, taken to be correct; a party seeking to reverse it must show that it is erroneous, and that the error prejudices him.

The defendant Allis, appellant here, alleges it to be erroneous, in that it adjudges the title to be in defendant Davidson, who was not the purchaser; and it does not appear that he was the assignee of the purchaser. The decree was entered on the motion of the plaintiffs, who were the purchasers. So

far as appears, they were the only persons who then had any interest in the title which passed by the sale. If they consented that the title should, nevertheless, be vested by the decree in any other person, it was a matter between them and such person. It is not apparent how any other party to the action, whose right of redemption was then barred, could be prejudiced by it. Appellant claims that, to justify the decree in vesting the title in Davidson, there must have been an assignment to him from the purchaser; and that such assignment to him, he being the debtor and mortgagor, would have operated as in favor of appellant, his grantee of an undivided half of the property subsequent to the mortgage, as a redemption from the sale; and in that case a decree vesting the entire title in Davidson as against him could not be entered, and the entering it was therefore error prejudicial to him. This argument rests, not on a state of facts shown by the record, but one which has only assumption and conjecture to sustain it. First, it does not appear that, prior to the actual entry of the decree, there was anything between plaintiffs and Davidson in the nature of an assignment. Further, if that had appeared, there is nothing to show it was made at such a time that it would take effect as a redemption, nor is there anything to show that Davidson owed Allis any duty to redeem. In the pleadings between plaintiffs and Allis in the action to foreclose, a conveyance of an undivided half of the property by Davidson to him, subsequent to the mortgage, is alleged by Allis in his answer, and admitted by plaintiffs in their motion for judgment. But that did not conclude Davidson, nor would the answer of Allis and the admission of plaintiffs be evidence of the fact as against him. In that action no issue of the kind was tendered to him, and no situation of the action prior to the judgment for sale occurs to us in which it could be, so that it could be litigated and determined between them.

It is also objected that the notice of application for the decree was given by plaintiffs, and that under that notice

only a decree vesting the title in them, and not one vesting it in some one else, could be entered. The purchaser or his assigns should make the application, and, of course, he must give the notice. A notice by one not holding, at the time of serving it, that position, would not do. Whether, upon his assigning after the notice, the proceeding would have to drop and be renewed by the assignee, or the application could still be made by the party serving the notice, for the benefit of his assignee, we do not find it necessary to determine. But we see no reason why, the notice and application being served and made by the right person, he may not on the hearing request a decree vesting the title in any one he may name, and the decree be so entered—certainly, so far as the other parties in the action, in their character as such parties, are concerned.

Decree affirmed.

GEORGE R. LYMAN and another *vs.* RASMUSSEN & NELSON.

December 28, 1880.

Extension of Time of Payment of Debt.—A valid agreement to extend the time of payment of a debt is a defence to an action on the debt during the time of the extension.

Appeal by plaintiffs from a judgment of the district court for Freeborn county.

John Whytock, for appellants.

Lovely & Morgan, for respondents.

GILFILLAN, C. J. Action for goods sold and delivered. The defence was that after the debt became due the defendants transferred to plaintiff two promissory notes of third persons as collateral security for the debt, in consideration whereof the plaintiff agreed with defendants that the time for payment of the debt should be extended to April 1, 1879. The action was brought before that date.

Whether a covenant not to sue within a given time be a defence, or, as some cases hold, be not a defence, to an action brought within the time, we have no hesitation in holding that a valid extension of the time of payment is a defence to an action brought within the time of the extension. During such time the debtor is not in default; the debt is not demandable, not due. So far as there may have been a default, and a right to sue for it prior to the time of the agreement to extend the time of payment, it must be taken to be waived by the extension. Such is of course the intention of the parties to the agreement; and where the agreement is valid, there can be no reason why a court should disregard it.

Judgment affirmed.

PATRICK KELLY vs. JESSE T. SEELY and another.

December 29, 1880.

Note, etc., given for Sowing-Seed—Prerequisites to Statutory Lien on Crop.—

Gen. St. 1878, c. 39, §§ 21, 22, provide a way in which a person making a sale or loan of "sowing-seed" may, for his security, acquire a lien upon the crop grown therefrom. *Held*, that the note or contract by these sections required to be given as a foundation for the lien must be given immediately after, or contemporaneously with, the receiving of the seed. It cannot be given for seed to be furnished at some time after the execution of the note or contract. Also, that the note or contract must contain a statement of the quantity of seed actually furnished and received. Also, that a note for a quantity of wheat, a part of which was not furnished and was not to be furnished until after the execution of the note, and a part of which never was furnished, does not comply with the substantial requirements of the statute, and the party taking it cannot, through it, acquire the statutory lien for seed actually furnished.

Replevin for 400 bushels of wheat, taken by defendants from plaintiff's possession on September 10, 1879. The wheat in question was raised in the year 1879, by one William Kelly, on certain land in Wabasha county described in

27	385
30	539
30	563
30	534
27	336
43	343
27	336
44	391

the complaint. The defendants claimed title by virtue of a chattel mortgage made to them by William Kelly on April 18, 1879, of all the crop then growing on the land in question. The plaintiff claimed the wheat as holder of a note of William Kelly given, on March 19, 1879, for seed, of the value of \$193, from which the crop was raised, and by virtue of the statutory lien given in such cases by Gen. St. 1878, c. 39, §§ 21, 22, quoted in the opinion. The defendants' mortgage and the plaintiff's note were both duly filed, the note being filed first. At the trial in the district court for Wabasha county, before *Mitchell, J.*, the plaintiff's note was put in evidence, as follows:

"HYDE PARK, March 19, 1879.

"On the first day of November, 1879, I promise to pay Patrick Kelly, or order, two hundred and fifty dollars for value received, with interest at the rate of ten per cent. per annum until fully paid. This note is given for 250 bushels of seed wheat this day purchased by Wm. Kelly of the above-named payee, at one dollar per bushel, to be paid for as stated. Said seed grain is to be sown upon the following described premises" (describing them as in the complaint;) "and the said payee and his assigns have full power and are hereby authorized to declare this note due at any time when he or they may deem themselves insecure, even before the maturity of this note.

WM. KELLY."

It appeared that of the wheat described in the note, only 150 bushels had been delivered to Wm. Kelly when the note was made, and that this 150 bushels had been raised the preceding year by Wm. Kelly himself, and at the time of making the note, Wm. Kelly turned this wheat over to plaintiff at the rate of one dollar per bushel, in payment of a precedent debt, and plaintiff at once sold it to him again at one dollar per bushel, the wheat being worth but 60 cents per bushel. The remainder of the wheat mentioned in the note was not furnished to Wm. Kelly when the note was made, but plaintiff was to procure one Greer to furnish it to him. Plaintiff in

fact procured Greer to furnish 60 bushels only, for which he paid Greer \$35.50, and these two amounts were all that Wm. Kelly ever received on account of the note.

The jury having found a verdict of \$198.40 for plaintiff, and the defendants having moved for a new trial, the court ordered that a new trial be granted unless the plaintiff file a stipulation that the value of his interest in the property in dispute was \$134 and no more, and remitting all the verdict in excess of that sum, and that, on his doing so, the motion for a new trial be denied. The plaintiff filed the stipulation, and had judgment accordingly, from which the defendants appealed.

E. M. Card and W. J. Hahn, for appellants.

C. H. Benedict, for respondent.

BERRY, J. It is enacted in Gen. St. 1878, c. 39, § 21, that "any person who desires to secure a loan or purchase of sowing-seed at any time, may, at the time of receiving such seed, give a note or contract for the same to the party of whom he secures it, stating the amount and kind of seed, the terms of the loan or purchase, and the time and manner of return or payment; and the party furnishing such seed, and receiving such note or contract therefor, may acquire a just and valid lien upon the crop growing or raised from such seed, by filing, as hereinafter provided, said note or contract, or a true copy thereof, or a statement of the amount and kind of seed furnished, and the terms, time and manner of payment." Section 22 provides that "the note, contract or statement, or copy thereof, * * * shall, in order to constitute such lien, be filed with the town clerk of the town in which the borrower resides, or in which the land on which said seed is sown is situated; * * * and from the time of filing such note, contract or statement, or copy thereof, the party loaning the seed, or assigns, shall have a valid first claim and lien upon the growing crop and the crop grown from such seed, to the amount and according to the terms of

the contract, against all creditors and purchasers, as well as against the owner."

The lien thus provided for was wholly unknown to the laws of this state until the passage of this statute. It is in all respects a creature of this statute, and therefore it can be acquired only by substantially following its provisions. Our reading of the statute, so far as it is important in this case, is this. Any person desiring to secure a loan or purchase of sowing-seed at any time of the year, whether just before the season of sowing or otherwise, may, at the time when he receives the seed, and not at any other time, give a note or contract for the seed received to the person from whom he secures it, stating the amount and kind of seed so received, etc.; and the party furnishing such seed, and receiving such note or contract therefor, may acquire a lien, etc., by filing, etc., said note or contract, or a true copy thereof, or a statement of the amount and kind of seed which has been furnished; and from the time of filing such note, contract, or statement, or a copy thereof, each as the case may be, containing a statement of the amount of seed received, shall have a lien, etc.

If this reading of the statute is correct, the note or contract required must be given immediately after or contemporaneously with the receiving of the seed. It cannot be given for seed to be furnished at some time after the execution of the note or contract. The note or contract must also contain a statement of the amount—that is, of the quantity—of seed received. The purpose of the statute being to give the person furnishing the seed a lien upon the crop grown therefrom, as against the creditors of the owner of the crop, and persons purchasing of him, it may fairly be conjectured that the legislature intended to prevent the privilege thus accorded to the parties to the note or contract from being used as a cover for fraud. They therefore required that the note or contract should be founded upon an actual delivery of seed, and not upon a promise to deliver it—in other words, that it should

be founded upon actual value received; and in the same spirit they further provided that the quantity and kind of seed actually furnished should be stated in the note or contract, and that these, or a copy or statement, should be filed in a public office, thus requiring the parties to spread upon record and make public the consideration of the note or contract which the lien was to secure, so that the creditors of the owner of the crop, and persons dealing with him, might be accurately informed as to what was claimed by the parties to be the consideration of the note or contract, and thereby be put in an advantageous position to investigate the transaction and detect fraud, if any there was.

If these were the intentions of the legislature and the purposes of the statute, (as we conceive them to have been,) the plaintiff's claim in this action cannot be sustained. If the 150 bushels of wheat furnished by the plaintiff himself were all that were mentioned in and covered by the note, it is very possible that, upon the evidence, his lien to the extent of the price of that quantity might be sustained. But the vice of the note is that of the remainder of the wheat mentioned in the note, none was or was to be furnished or received until after the execution of the note, and nearly half of it (at least) was not furnished or received at all. The amount of wheat stated in the note was, then, never furnished or received, and consequently the note does not state the amount furnished or received. For these reasons we are of opinion that the note failed to comply with the substantial requirements of the statute, and that, therefore, the plaintiff could not and did not acquire the lien which the statute gives.

Judgment reversed.

37 390
45 601A. H. DAVIS and another *vs.* N. B. SMITH.

December 30, 1880.

Payment of personal Debt by Partner with Firm Check—Creditor chargeable with Bank's Knowledge.—H. and S. were partners. H. owed plaintiffs on his own account. They drew on him a draft for the amount of the debt, and sent it to a bank for collection. To pay the draft, H. drew his check on the bank for part of the amount, and the partnership check for the remainder, he and the firm both having accounts with the bank. *Held*, that knowledge by the bank that partnership funds were used in paying the draft charged plaintiffs with notice of that fact, and the *onus* is on plaintiffs to show authority in H. from his copartner to so employ the partnership funds. Evidence as to such authority considered, and *held* that the question ought to have been submitted to the jury.

Action to recover the price of goods sold and delivered by plaintiffs to defendant. The defendant, in his answer, admitted plaintiffs' cause of action, and, as a counterclaim, pleaded that plaintiffs had received from one J. S. Huntley certain moneys of the firm of J. S. Huntley & Co., (composed of Huntley and the defendant,) in payment of Huntley's individual debt to the plaintiffs, with knowledge that the moneys so received were moneys of the firm; and that such payment by Huntley was without the consent or knowledge of the defendant, and in violation of the terms of the partnership agreement between them.

At the trial in the district court for Wabasha county, before *Mitchell, J.*, it appeared that for some time prior to June 1, 1876, J. S. Huntley had been engaged in business at Mazeppa, in that county, and on that day was indebted to plaintiffs for goods bought of them in the sum of \$849.34. On that day J. S. Huntley and the defendant formed a partnership under the name of J. S. Huntley & Co., and thereafter until March, 1878, carried on under that name the same business previously carried on by Huntley. The firm also dealt with plaintiffs. On June 1, 1876, the plaintiffs drew on J. S. Huntley for \$814.54, part of his individual debt to them. The draft was dated at La Crosse, Wis., (the plaintiffs' place

of business,) and was payable to plaintiffs' order, and by them endorsed to the cashier of the Lake City Bank for collection, and sent to that bank to be collected. On June 2, 1876, Huntley accepted the draft in the name of the firm, and paid \$500 thereon. This payment was made by his check against his individual account with the bank. On October 10, 1876, the balance then due on the draft—\$323—was paid by Huntley by a check of J. S. Huntley & Co. against the firm account. Both payments were made at the bank to its cashier, who remitted the amount to the plaintiffs, who had no knowledge as to how the payments were made by Huntley to the cashier.

There was also evidence that J. S. Huntley had the management of the firm business, the defendant being on his farm; that when the partnership was formed, it was agreed that \$558 of the capital furnished by defendant should go to Huntley to pay his debt to plaintiffs, and that this sum was paid by defendant to Huntley at the Lake City Bank, on June 1, 1876, in the presence of the cashier, and was credited to defendant on the firm books; that defendant did not know until after the firm dissolved that Huntley had used the money of the firm to pay his individual debts, and that such use was without defendant's consent. There was no evidence as to what was done by Huntley with the \$558 paid him by defendant. At the close of defendant's evidence, the court directed a verdict for plaintiffs for the full amount of their demand, the defendant duly excepting. A new trial was refused, and the defendant appealed.

E. M. Card, for appellant.

W. J. Hahn, for respondents.

GILFILLAN, C. J. The draft of plaintiffs on J. S. Huntley for \$814.51 was upon a debt from him to them. They sent it for collection to the Lake City Bank. The bank was agent for them to collect the draft, and the knowledge which the bank had of a misappropriation by J. S. Huntley of the funds of the firm of J. S. Huntley & Co., in paying the draft,

was in law knowledge of the plaintiffs. One partner cannot, without the consent, express or implied, of the other partners, use the funds of the partnership in paying his individual debt. A creditor receiving funds so misappropriated, knowing that they are so misappropriated, cannot retain such funds; and if he knows that such funds are partnership funds, the *onus* is on him to show the consent of the other partners. *Bank of Commerce v. Selden*, 3 Minn. 99 (155.)

This brings the case down to the question of fact, Did J. S. Huntley, in paying the draft, use the funds of the firm without authority of his partner, Smith? Of the draft, \$500 was paid by him with his own funds,—that is, by his check drawn against his own account; \$323 was paid by him with funds of the firm—that is, by the check of the firm drawn by him against the firm account. It appears that Smith, the defendant, at the time of entering the copartnership, paid Huntley \$558, to be used by him in paying his debt to plaintiffs. From this fact authority in him to draw upon the firm funds to that amount in paying his debt is claimed. Whether it shows such authority depends on how it was paid by defendant to Huntley. If, as plaintiff contends, it was paid into and became part of the partnership assets, and, if deposited in the bank, was deposited to their credit, there can be no doubt Huntley had authority to draw on the firm funds to the amount of \$558 to pay the specified debt. On the other hand, if, as defendant contends, it was paid to Huntley as his own money, and never went into and became part of the firm assets, but was retained by him in his individual account, then there was no part of the firm assets which he had authority to draw against to pay this debt. The evidence on the point is not clear, but leaves it in doubt whether the \$558 was paid by defendant to Huntley as his individual property, or to become part of the capital and assets of the firm. It was a question for the jury, and should have been left to them to decide as best they could from the evidence.

Judgment reversed, and new trial ordered.

ANDREW BRANDUP vs. ST. PAUL FIRE & MARINE INSURANCE
COMPANY.

December 30, 1880.

27	393
58	498
27	393
59	195
60	280
27	393
64	393

Fire Insurance Company Chargeable with its Soliciting Agent's Knowledge of other Insurance—Waiver of Condition.—F. was "soliciting agent" for defendant and another insurance company, with authority from defendant, as "soliciting agent," to receive and forward for its approval applications for insurance. B. applied to him, at the same time, for insurance upon the same property against fire in both companies. The agent filled up the application to defendant, which was signed by B., explaining to him how the question in regard to other insurance should be answered. The application did not mention the contemplated insurance in the other company, but the agent was to notify defendant of it. Upon this application defendant issued its policy, and sent it to F. for delivery. He delivered it at the same time with the policy of the other company, defendant's policy not having endorsed on it a consent to such other insurance. *Held*, that defendant was chargeable with its agent's knowledge of the application for and issuance of the policy of the other company, and that, by delivering its policy without endorsing its consent to the other insurance, it waived, as to such other insurance, a condition in its policy avoiding the policy in case of other insurance unless its consent thereto were endorsed on the policy.

Appeal by defendant from an order of the district court for Wilkin county, *Brown*, J., presiding, refusing a new trial.

Harvey Officer, for appellant.

Wilson & Lawrence, for respondent.

GILFILLAN, C. J. Action on a policy of fire insurance, issued by defendant to plaintiff. The policy contained this condition: "If the assured shall have or shall hereafter make any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void." One of the defences was that after the issuance of this policy, the plaintiff procured the issuance, by the Continental Insurance Company, of a policy insuring the same property, of which defendant had no knowledge or

notice, and to which it did not consent, and did not indorse its consent on its policy, by reason whereof its policy became void prior to the loss. These facts do not seem to have been controverted in the evidence. One Charles B. Falley was what is called "soliciting agent" for both the companies at the place where the property insured was situated. His authority as "soliciting agent," from defendant, was to receive and forward for its approval applications for insurance. Plaintiff applied at the same time to the agent for insurance in both companies. Written applications therefor were written by the agent and signed by plaintiff, and then forwarded by the agent to the respective companies. The application to defendant made no mention of other insurance, either perfected or applied for. The agent instructed plaintiff how the question in the application in regard to other insurance should be answered, and it was so answered, and the agent was to notify the company of the other insurance. The applications were approved, and policies made out by the respective companies and forwarded to the agent, Falley, and were by him delivered at the same time to plaintiff. The premiums were paid to the agent, either when the applications were signed or when the policies were delivered. There was no endorsement on defendant's policy in respect to the insurance in the other company.

The application to defendant's soliciting agent was made with notice to him that plaintiff desired and intended to procure other insurance on the same property. It was, in effect, an application for a policy which would permit such other insurance. Notice of that to the agent was notice to the company. To ascertain what was desired from the company in the way of insurance, on the part of the applicant, was certainly within the authority of the agent; and notice to him of what was desired was notice to his principal, and his explanation of the questions put to the applicant in the application, and of the proper answers to them, the applicant

acting in good faith, were binding on his company. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Sandford v. Handy*, 23 Wend. 260; *Nelson v. Cowing*, 6 Hill, 336; *Molieres v. Pa. Fire Ins. Co.*, 5 Rawle, 342; Wood on Fire Ins. § 386.

Plaintiff had a right to expect a policy that would permit the other insurance which the defendant knew he desired and intended to procure; and when the policy came to him, he had a right to assume that it was such as he had applied for, and that the company waived any conditions in the policy apparently inconsistent with his right to procure the other insurance. This was especially so when the defendant entrusted the final act of executing the policy—the delivery—to its soliciting agent, (which was authority in addition to that of mere “soliciting agent,”) and such agent then actually had in his hands for delivery the policy for the other insurance, and delivered it with that of defendant. Any fact the agent at that time had notice of, the knowledge of which came to him as agent, that would affect its policy, defendant had notice of. The defendant, therefore, delivered its policy, knowing that at the same time a policy for other insurance became effectual. It thereby waived its right to object to such other insurance. We do not see anything in the point made by defendant in respect to the amount of the recovery.

Order affirmed.

HARVEY N. MERCHANT and others vs. CHARLES H. WOODS.

January 6, 1881.

Foreclosure by Advertisement of a Mortgage paid before Default, but not discharged of Record.—Where a paid-up mortgage, containing a power of sale duly recorded therewith, is allowed to remain undischarged of record, and to be regularly foreclosed by advertisement under the statute without objection, a purchaser at the sale, without notice and for value, upon duly recording his certificate of purchase, duly executed and acknowledged, together with the affidavits of publication and sale provided by statute, will acquire a valid title to the property upon the expiration of the year without redemption, as against the mortgagor and his assigns.

Action to determine defendant's adverse claim to a certain vacant lot in the city of Minneapolis. Trial in the district court for Hennepin county, before *Vanderburgh, J.*, who found the following facts: On February 20, 1872, one Mahla, being owner in fee of the lot in question, executed and delivered to one Sarah P. Smith his three promissory notes for \$100 each, bearing that date, and payable to her order at one, two and three years, respectively, from date, with ten per cent. interest per annum, and to secure payment of this indebtedness, Mahla executed and delivered to her a mortgage of the lot in question, which contained the usual power of sale in case of any default in the payment of any of the money or interest secured thereby, and was duly recorded on March 13, 1872. In the year 1873, the lot was conveyed to one Connelly, by deed duly executed and recorded, in which deed Connelly assumed to pay the balance due on the mortgage, and which deed recites that there remains unpaid thereon the sum of \$200 principal, and interest from February 20, 1873. On April 10, 1874, Connelly paid the mortgage in full to an agent of the plaintiff at Minneapolis, who had received former payments thereon, and who was fully authorized to receive such payment, but not to discharge the mortgage of record. Connelly took from the agent a receipt showing payment in full

of the balance due on the mortgage. He did not receive the last note, (the only one then outstanding,) which either was not in the agent's possession, or could not be found by him; nor did Connelly receive the mortgage, which was then in the hands of Sarah P. Smith, who resided away from Minneapolis. The agent never entered the payment in his books, nor reported it to his principal, nor accounted to her for it in any way. Several years after the payment, Sarah P. Smith transferred the agency to the present defendant, who received from the former agent the last note, with other papers belonging to her. The payment was not indorsed on the note. Sarah P. Smith then proceeded to foreclose the mortgage by advertisement. The sale was made pursuant to the notice, on May 5, 1877, and the property was struck off to defendant as the highest bidder, who received the proper certificate of sale, which, with the proper affidavits, etc., was duly recorded May 8, 1877.

Connelly died in August, 1874, leaving one daughter, who died in January, 1875, leaving as her sole heir one Maria Merchant, who died in February, 1877, having devised the lot in question to plaintiffs. No claim or demand was made on Connelly in his lifetime, nor upon any one, for any balance due on the mortgage, until the foreclosure proceedings. There was no evidence as to any notice had by plaintiffs, or any person under whom they claim, of the foreclosure proceedings, other than the notice of sale published. The foreclosure proceedings were entirely regular; there appeared to be due on the face of the note and mortgage (previous payments being indorsed) the amount claimed in the foreclosure notice; the mortgage was never discharged of record, nor was any demand for a discharge ever made; and the defendant purchased at the sale and paid the consideration in good faith, and without notice of the claim of payment made by plaintiffs. The time for redemption from the sale expired on May 5, 1878, and no redemption was ever made. This action was brought in October, 1878.

As conclusions of law the court held that the payment to the agent was a valid payment, and operated as a satisfaction of the mortgage as between the parties, and as to any person having notice; but that as to the defendant, a purchaser in good faith, the sale was valid. Judgment was ordered and entered for the defendant, and the plaintiffs appealed.

H. G. O. Morrison, for appellants, cited *Cameron v. Irwin*, 5 Hill, 272.

Woods & Babcock, for respondent.

CORNELL, J. The statutory provisions relating to recording conveyances of any estate or interest in real estate by which the title may be affected, are especially designed for the benefit and protection of parties dealing in that kind of property. The leading object is to provide full, truthful and reliable information respecting titles, easily accessible to all, and upon which any one may safely act in making a purchase when he has no knowledge or notice of any fact sufficient to put him upon inquiry, or to excite suspicion as to the fulness or accuracy of the record title. Wade on Law of Notice, § 96. To this end every such conveyance by deed, mortgage, or otherwise, is required to be recorded in the office of the register of deeds of the county where the real estate is situated, and, if not, it is declared to be void as against any subsequent purchaser of the same in good faith, and for a valuable consideration, whose conveyance, in whatever form, is first duly recorded. Gen. St. 1878, c. 40, § 21. Within the meaning of this section, a release by a mortgagee of his interest and estate in mortgaged premises, whether done by an entry in the margin of the record, by a certificate of discharge as authorized by section 36, or by a decree of court under section 37, is a conveyance, as that term is defined by section 26. Such was the ruling of this court in *Palmer v. Bates*, 22 Minn. 532, where it was also held that an unrecorded release of a portion of the mortgaged premises was of no avail as against an innocent purchaser for value, acquiring title under a statutory foreclosure by advertisement of the mort-

gage upon the entire tract, and a certificate of sale duly executed and recorded, with the usual affidavits of sale and publication of the foreclosure notice.

In the case at bar, the foreclosure proceedings under which defendant claims title were had in strict conformity with the requirements of statute, and without objection from any source. The foreclosure notice was duly published, the mortgage was undischarged of record, and it and the note, for default in the payment of which the foreclosure was had, both purported upon their face to be unsatisfied, and were so held by the mortgagee at the time, of which facts the defendant had knowledge prior to his purchase. The certificate of sale and the affidavits of publication and sale were duly made and recorded, and it is not questioned that the defendant in entire good faith bought and paid a valuable consideration for the property, which was vacant and unoccupied at the time. In view of these facts it is difficult to distinguish the present case in principle from that decided in *Palmer v. Bates, supra*. The additional fact which exists in this case, but did not in that, that the whole mortgage debt was paid prior to the foreclosure, is only important as showing the extent of the relinquishment of the mortgage security as between the parties thereto and their assigns; but it does not affect the question as to the effect of such relinquishment against third parties, having no notice thereof, actual or constructive. As between the former, such payment would operate to extinguish the entire mortgage and all rights under it, and would equitably entitle the mortgagor or the holder of the equity of redemption to a deed of release from the mortgagee, releasing and relinquishing all his interest and rights under the mortgage. But no greater effect could be given to such a payment than would be accorded to a full deed of release, founded upon any valid consideration, covering and relinquishing all the rights of the mortgagee under his mortgage. If such a release, unrecorded, would be ineffectual to defeat the title of an innocent purchaser without notice, acquired under a subsequent and

apparently valid foreclosure of the mortgage, clearly a payment of the mortgage debt, unaccompanied by any written release whatever, would be equally ineffectual under like circumstances.

The invalidity, under the registry laws, of such an unrecorded release, as respects the rights of such a purchaser, follows as a logical sequence from the decision in *Palmer v. Bates, supra*. Though the release in that case only covered a part of the mortgaged premises, the decision was not put upon that ground, but upon the ground that the statute makes every unrecorded instrument of that character, without regard to the extent of the interest released, void as against any purchaser in good faith, and for a valuable consideration, whose conveyance is first duly recorded. The principle, and the reason for it, is this: Whenever the lien of a recorded mortgage containing a power of sale is in fact discharged, in whole or in part, by payment or otherwise, the law makes it the duty of the mortgagor or the holder of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record. A failure so to do leaves the mortgage apparently a subsisting security, and the mortgagee apparently still clothed with the authority originally conferred by the power; and if, in the exercise of such apparent authority, a foreclosure is regularly had, and a sale is effected upon the faith of the appearances, the innocent purchaser will be protected in his title, if first recorded, as against the party through whose fault and negligence the apparently valid foreclosure and sale were rendered possible.

Upon the findings of fact, the case at bar comes clearly within this principle. The facts, as they appeared to defendant from the record of title which constituted notice to him as a purchaser, showed a mortgage debt long overdue, a mortgage unsatisfied, and an existing power of sale that had become operative by reason of a default in the payment of the debt. The possession of the note and mortgage by the mortgagee,

and their appearance, furnished additional evidence in support of the same facts. Suffering the foreclosure and sale to pass without objection, after the publication of the foreclosure notice provided by statute as sufficient and conclusive notice of the proceedings to interested parties,—*Bennett v. Healy*, 6 Minn. 158 (240.)—was, to say the least, an apparent acquiescence on the part of the mortgagor, and those claiming under him subsequent to the mortgage, in the validity of the foreclosure, and the claim of default upon which it was based. The apparent existence of these facts was the direct result of the culpable neglect of Connelly in omitting to do what ordinary prudence and duty required of him under the circumstances. They all concurred and were well calculated to induce a belief in their validity by the defendant, and to cause him to make the purchase he did upon the faith of that belief. Having completed the purchase in good faith, got the statutory conveyance evidencing his title, and placed it properly upon record, the defendant is protected against the fraud and injustice which would result if Connelly were now permitted to impeach its validity, by showing that the mortgage was in fact extinguished prior to its foreclosure.

Judgment affirmed.

LEOPOLD ABRAHAMS and others vs. TIMOTHY J. SHEEHAN.

January 7, 1881.

Statement of Case—Allowance and Signing.—A statement of the case on which to move for a new trial, or to appeal, must be allowed and signed by the judge or referee. The stipulation of the parties will not dispense with such allowance and signature.

Appeal by defendants from a judgment of the district court for Freeborn county. The stipulation mentioned in the opinion is as follows:

[Title of Cause] "It is stipulated between the attorneys of the respective parties to the above-entitled cause that the foregoing case and exceptions may be considered as the settled case and exceptions in the same, on which the appeal therein may be heard in the supreme court: plaintiffs to have until the 1st day of August, 1880, to compare the testimony herein with reporter's original notes, and to make corrections if the same do not correspond.

"Dated July 20, 1880.

[Signed]

"JAMES N. GRANGER and

"JOHN WHYTOCK,

"Attorneys for Defendants and Appellants.

"LOVELY & MORGAN,

"Attorneys for Plaintiffs and Respondents."

James N. Granger and John Whytock, for appellants.

Lovely & Morgan, for respondents.

GILFILLAN, C. J. In this case the "statement of the case," though stipulated by the attorneys for the respective parties, was not allowed and signed by the judge. The objection is made here by the respondents that no exceptions appearing only on the statement can be considered here, because it is not signed by the judge. The point is well taken. The statute expressly provides for allowance and signature by the judge, (Gen. St. 1878, c. 66, § 255,) and we do not think it can be dispensed with. *Leonard v. Warriner*, 20 Wis. 41.

Judgment affirmed.

THOMAS J. BARNEY vs. M. T. C. FLOWER and another.

January 7, 1881.

27	408
30	361
27	403
53	271

Statutory Submission to Arbitration—Acknowledgment.—In a submission to arbitration under the statute, the agreement to submit must be acknowledged before a justice of the peace. An acknowledgment before any other officer will not do. The proper acknowledgment cannot be afterwards waived by the parties, even though that objection is not made on the application to confirm the award, and for judgment on it. A judgment entered on such award is erroneous.

Thomas J. Barney, of the one part, and M. T. C. Flower and H. P. Winder of the other, entered into an agreement to submit to three arbitrators therein named all matters of dispute between them growing out of a lease of certain real estate from the former to the latter, the submission providing that, the award being made and reported to the district court for Ramsey county, final judgment should be entered thereon in that court. The arbitrators having made an award in favor of Barney, he moved for judgment thereon. The motion was opposed, but was granted by *Simons, J.*, and judgment was entered, from which Flower and Winder appealed.

C. K. Davis and *E. S. Chittenden*, for appellants.

Lamprey & James, for respondent.

In making the submission all that is necessary is a substantial compliance with the requirements of the statute. *Bacon v. Ward*, 10 Mass. 141; *Bloomer v. Sherman*, 5 Paige, 575; *Hill v. Taylor*, 15 Wis. 208; *Wright v. Raddin*, 100 Mass. 319. If parties appear before arbitrators illegally appointed or chosen, they waive the defect. *Mitchell v. Wilhelm*, 6 Watts, 259; *Cutter v. Whittemore*, 10 Mass. 442.

GILFILLAN, C. J. Of the many objections made by the appellant to the judgment appealed from we shall notice but one, as that is fatal to the judgment. The statute regulat-

ing the submission of controversies to arbitrators provides, (Gen. St. 1878, c. 89, § 3,) "The parties shall appear in person, or by their lawful agents or attorneys, before any justice of the peace, and shall there sign and acknowledge an agreement, in substance as follows: * * *" Of the three persons entering into the agreement to submit to the arbitration, two only acknowledged before a justice of the peace, and they not before the same justice, and a third acknowledged before a notary public.

The jurisdiction of the arbitrators under the statute over the matter referred to them depends on a compliance with the statute. It is a special jurisdiction, which can be created only in the manner prescribed by the statute. Every material requirement of the statute must be complied with. Among them is the acknowledgment prescribed. *Heath v. Tenney*, 3 Gray, 380; *Abbott v. Dexter*, 6 Cush. 108; *Franklin Mining Co. v. Pratt*, 101 Mass. 359; *Fink v. Fink*, 8 Iowa, 312.

That the acknowledgment shall be made before a justice is made by the terms of the statute as essential as the signing. It is argued that what the statute aims at is to have the agreement acknowledged; that the acknowledgment is the material thing, and that it is immaterial before what officer it is made, if he have authority to take acknowledgments. We do not know why the legislature required the acknowledgment to be taken by a justice of the peace, rather than by any other officer; but it has so required, and courts have no more right to treat an acknowledgment before any other officer as a compliance with the statute than they have to dispense with the acknowledgment altogether, and substitute some other mode of proof of the signing. The submission, therefore, though it may have been good as a submission to arbitration at the common law, did not give to the proceedings the character required to authorize a judgment to be entered on the award under the statute. The appear-

ance, without objection, of the parties before the arbitrators could not give the proceedings that character. The want of the statutory jurisdiction could not be waived. The arbitrators could not be constituted the statutory tribunal by acquiescence of the parties, nor by any other mode than that pointed out by the statute. The court below should have rejected the award.

The respondent also insists, upon the authority of *Gaines v. Clark*, 23 Minn. 64, that by failing to make this objection in the court below, on the application for judgment on the award, the appellant is concluded from making it here. The record shows that the application was opposed—on what ground, does not appear. In *Gaines v. Clark* there was a statutory award; and, where such is the case, any objection to judgment on it must be made in the court below. In this case there was no statutory award—nothing to sustain a judgment under the statute. The objection is like that to the absence of a complaint, or to the insufficiency of a complaint, which is not waived merely by omitting to object to it in the court below. We do not think, as some cases hold, that the fact that the award is not entitled to the effect which the statute gives to one entirely regular affects the jurisdiction of the district court in a case where the parties have evidently attempted to follow the statute. That court has authority to determine whether the statute has been complied with; but if it render judgment on an award not statutory, its judgment is erroneous.

Judgment reversed.

27	406
58	463

HERMAN KASER vs. GEORGE HAAS.

January 11, 1881.

Homestead in Undivided Interest in Land.—The ownership by the occupant of an undivided interest, as of an undivided three-fourths, in land occupied as a homestead, is sufficient ownership to sustain a homestead exemption.

Same—Purchase of Outstanding Interest.—An outstanding interest in land held and occupied as a homestead does not, when conveyed during the continuance of the homestead right to the occupant, become subject to the lien of a judgment docketed prior to such conveyance, but while the homestead right exists.

Plaintiff, being the owner of a certain lot in the city of St. Paul, brought this action in the district court for Ramsey county to restrain the defendant from selling the same under a certain judgment, and to have the said judgment declared to be no lien upon said lot.

Upon the trial of the action before *Brill, J.*, the court found as facts that prior to January 11, 1878, one George Willig was the owner of an undivided three-fourths of said lot, and occupied the same as his homestead; that on January 11, 1876, the defendant recovered judgment against said Willig, and had the same duly docketed, and that subsequently, while still holding the lot as his homestead, Willig acquired the remaining interest, and conveyed the entire lot to plaintiff. Upon these facts the court declared the judgment to be a lien upon the entire lot, and ordered judgment for defendant, from which plaintiff appealed.

S. L. Pierce, for appellant.

C. N. Bell and *P. C. Haas*, for respondent, argued that a claim of homestead will not attach to an undivided interest in land, and cited: *Ward v. Huhn*, 16 Minn. 159; *Kresin v. Mau*, 15 Minn. 116; *Kelly v. Dill*, 23 Minn. 435; *Thurston v. Maddocks*, 6 Allen, 427; *Wolf v. Fleischacker*, 5 Cal. 244; *Reynolds v. Pixley*, 6 Cal. 165; *Kellersberger v. Kopp*, 6 Cal.

565; *Bishop v. Hubbard*, 23 Cal. 514; *Elias v. Verdugo*, 27 Cal. 418; *Seaton v. Son*, 32 Cal. 481; *Kingsley v. Kingsley*, 39 Cal. 665; *Cameto v. Dupuy*, 47 Cal. 79; *West v. Ward*, 26 Wis. 579; *Lozo v. Sutherland*, 38 Mich. 168; *Amphlett v. Hibbard*, 29 Mich. 298; *Ventress v. Collins*, 28 La. An. 783; *Simmon v. Walker*, 28 La. An. 608; *Borron v. Sollibellos*, 28 La. An. 355; *Bemis v. Driscoll*, 101 Mass. 418.

GILFILLAN, C. J. When defendant's judgment against George Willig was docketed, the latter was occupying as his home and owned an undivided three-fourths of the lot in question—lot 3, block 2, Brunson's addition to St. Paul. After the docketing he removed from the lot, and never afterwards resided on it, but, within six months from his removing, he duly made and filed notice, as provided by law, of his claim of the lot as his homestead. Within a year after removing, the outstanding undivided one-fourth interest was conveyed to him, and afterwards, within said year, he conveyed the lot to plaintiff. Defendant claims that the lot is subject to the lien of his judgment against Willig, and may be sold on execution under it, and that at any rate the undivided one-fourth conveyed to Willig, after the judgment was docketed, became subject to the lien. Plaintiff claims that when the judgment was docketed the lot was Willig's homestead, and so not subject to the lien of the judgment, and that the undivided one-fourth, being conveyed to Willig when the exemption was in force, became subject to it, and not to the judgment lien.

Laws 1860, c. 95, § 1, and Laws 1868, c. 58, § 1, (Gen. St. 1878, c. 68, §§ 8, 9,) so far as they provide for retaining the homestead exemption in case of removal from the premises, are not repealed by Laws 1875, c. 65, § 1, and c. 66, § 1, (Gen. St. 1878, c. 68, § 1.)

The questions presented are: Is an owner of only an undivided interest in a lot occupied by him as his home entitled to hold it as a homestead exempt from the lien of, and execution and sale under, judgments against him? And, if

so, does the judgment lien attach to the outstanding undivided interest, if, after the docketing of the judgment, but while the exemption exists, that interest is conveyed to him?

That an owner of an undivided interest only cannot claim the exemption is held in some states, as in Massachusetts, New Hampshire, California, Indiana and Wisconsin; the contrary is held in other states, as in Illinois, Iowa, Arkansas, Texas, Vermont and Michigan. The statute in this state (Gen. St. 1878, c. 68, § 1,) provides: "A homestead, consisting of any quantity of land, not exceeding," etc., "and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this state, shall not be subject to attachment, levy or sale," etc.; and section 8: "Nor shall any judgment or decree of any such court be a lien on such homestead for any purpose whatever." This apparently contemplates there shall be an ownership in some sort (at least) of title to the land, as well as occupancy, and that mere occupancy, without any ownership, will not support a homestead claim in the land; that is, that a mere trespasser, occupying without right, cannot claim the protection of the statute. It is generally conceded that the ownership need not be of an estate in fee-simple; that the occupant need not be sole owner of the entire estate. So in *Wilder v. Haughey*, 21 Minn. 101, an equitable owner—one occupying under a contract for purchase merely—was held entitled to the exemption. It would seem to follow logically from the principle of that decision that the character of the ownership, or of the estate or interest owned, is not material, so that it gives the right of occupancy—so that there is a concurrence of ownership and occupancy, the former sustaining the latter. The court, in its opinion, speaking of the purpose, spirit and policy of the statute, said: "It would seem, as a general rule, that the less the estate and interest, the more important its preservation to the claimant and his family, and the greater the necessity for surrounding it with the defences of the statute." A tenant in common or joint tenant

has, by reason of his estate or interest, a right to the possession, to the exclusive possession, as against all the world but his cotenant. His exclusive possession is rightful, except as against the demand of his cotenant to be let into joint possession. The fact that the cotenant may, if he choose, disturb such exclusive possession, cannot affect the right to the undisturbed possession as against every one else, nor affect the right, as against all the world but the cotenant, to occupy the premises as a homestead.

We are unable to see much force in the reason assigned by some of the courts for denying the homestead right to the owner of only an undivided interest in the estate, to wit, that it would be practically impossible to set off for him any specific portion which might not, on partition, fall to his cotenant. In setting off the homestead between the claimant and his creditor, the rights of third persons are not considered, nor does it matter that a portion selected by and set off to the claimant, as between him and the creditor, may, in a subsequent controversy between the claimant and some third person, be lost to the former. The object of the statute is not to vest in the claimant an assured title to the portion set off, but to protect that portion from levies and sales under judgments. When there is the requisite ownership and occupancy of the portion selected and set off, it cannot be material that such ownership and occupancy may be subsequently defeated, as by the foreclosure of a lien already attached, or re-entry for condition broken, or the like.

Ward v. Huhn, 16 Minn. 159, which is cited as bearing on the question under discussion, does not touch it. The only question in that case was, Is an undivided half of two lots equivalent, under the statute, to a quantity of land not exceeding one lot? The court held that it is not. That an owner of an undivided interest in a quantity within the statute limit may or may not be entitled to the exemption, was not before the court. We have no hesitation in holding that ownership of an undivided interest, with the requisite occupancy,

will sustain the homestead claim to a quantity of land not exceeding that allowed by statute.

The decision of this question necessarily indicates that of the second question.

The statute does not exempt any particular interest in the land. Its protection is not confined to the particular title or interest to the claimant. It exempts the "homestead"—that is, the land and the dwelling-house thereon—and the appurtenances; the land and dwelling, not the interest or title of the claimant, are the homestead. While the land and dwelling remain the homestead, no judgment against the claimant can become a lien. The inquiry as to his title is to ascertain if the right of exemption has attached to the land, not to determine what particular interest is exempt. The land being exempt, no mere changes in the claimant's title, so long as he retains sufficient title to support the homestead claim, can affect the exemption. An outstanding interest is not a thing separate and apart from the land, so that its acquisition by the claimant may affect the exemption. *Spencer v. Geissman*, 37 Cal. 96.

It follows that at the time of plaintiff's purchase the judgment of defendant was not a lien to any extent on the lot, and the plaintiff is entitled to judgment as demanded in his complaint.

Judgment reversed, and cause remanded for entry of the proper judgment.

BERRY, J., *dissenting*. I agree to the conclusion arrived at by my brethren as to the exemption of the three undivided fourths of the lot which were owned by Willig at the time when the defendant's judgment was docketed. As to the other undivided fourth, Willig had no ownership of it, or of any interest in it of any kind or degree, at the time when defendant's judgment was docketed. At that date, and for some time after, it was owned by another person. He might have conveyed a perfect title to it, unencumbered by any claim

whatever on the part of Willig, or it might have been levied upon and sold as his (the owner's) property, and, if not redeemed, the purchaser would have acquired an absolutely perfect title to it. As Willig, therefore, was not its owner, in any sense, I think it could not be and was not a part of his homestead, for the statute requires that the homestead shall be owned by the claimant.

WILLIAM DAWSON and another *vs.* GIRARD LIFE INSURANCE,
ANNUITY AND TRUST COMPANY OF PHILADELPHIA.

January 25, 1881.

Real Estate of Deceased Person—Liability for Debts.—*State v. Ramsey County Probate Court*, 25 Minn. 22, followed and applied to this case.

Vendor's Lien—Subsequent Creditor without Notice.—A vendor's lien upon real estate does not prevail against a creditor of the vendee, whose claim accrued subsequently to the lien, and without notice of it.

Payment of Creditor of Deceased Person.—Query: Whether the proviso of Gen. St. 1878, c. 46, § 3, has any reference to the right of a creditor of a decedent's estate to insist that the real property of the same shall be sold and applied to the payment of his debt.

Payment of Taxes by Claimant not in Possession.—In an action under the statute to determine an adverse claim to real property, the defeated party, not having been in possession of the premises in controversy, is not entitled to any relief on account of having paid taxes upon such property.

Appeal by plaintiffs from a judgment of the district court for Ramsey county in an action to quiet title, tried before *Simons, J.*, without a jury, adjudging that the plaintiffs had not any estate, title or interest in or to the real estate in controversy, but that the defendant was owner thereof in fee-simple.

J. B. Brisbin, and *W. S. Moore*, for appellants.

Allis & Allis, for respondent.

BERRY, J. On September 2, 1857, Vetal Guerin, owning certain real estate in Ramsey county, being the same which is in controversy in this action, conveyed it to Philip Goldsmith, and, in exchange, Goldsmith, by warranty deed, conveyed to Guerin certain real estate in Dakota county, to a part of which he (Goldsmith) had no title. On January 19, 1858, Goldsmith, by warranty deed, conveyed certain real estate to William Coffin. On August 8, 1863, Goldsmith died testate, seized of the lands in controversy, by his will making Sarah Goldsmith (his widow) his sole executrix and devisee of said lands. On August 26, 1866, the will was duly admitted to probate in Ramsey county, and an attested copy of the same, and of the probate thereof, duly recorded in the registry of deeds. The executrix entered upon her duties and continued to act until she was removed, on April 20, 1876. On December 8, 1869, Coffin was evicted from the lands conveyed to him by Goldsmith, under a claim of paramount title. Commissioners to pass upon claims against Goldsmith's estate were appointed by the probate court of Ramsey county, on December 20, 1869. Upon the presentation of Coffin's claim for damages for the breach of the covenant of warranty by his eviction, the commissioners allowed him \$28,548.55, and duly filed their report September 27, 1870. On appeal to the common pleas and to this court, Coffin's damages were finally fixed at \$42,122.28, with costs, and proper transcripts were filed in the probate court, on March 13, 1876. Upon the removal of the executrix, Beals, having been duly appointed administrator, with the will annexed, of Goldsmith's estate, and having qualified and entered upon his duties, commenced proceedings, on March 28, 1877, in the probate court, to sell the real estate in controversy to satisfy Coffin's claim, and, in pursuance of license granted May 6, 1878, sold the same for that purpose to defendant, on June 3, 1878. This is defendant's title, and it must be taken to be a good title unless the plaintiffs can show a better.

On November 30, 1867, Guerin, being in embarrassed circumstances, assigned his claim for damages for the breach of covenant in Goldsmith's deed to him to Brisbin, who was to prosecute the same, and pay over the proceeds (less a reasonable compensation for services) to Guerin. On December 20, 1867, Brisbin commenced an action for the recovery of the claim for breach of the covenant of seizin, in his own name, but for Guerin's benefit, against Sarah Goldsmith, as executrix as aforesaid. The action was not prosecuted to judgment, but it was agreed that it should be dismissed, in consideration that said Sarah, as executrix and devisee, should convey the land in controversy to Guerin. On May 6, 1868, she accordingly quitclaimed the same to Clark, who, at Guerin's request, quitclaimed the same to Brisbin's wife, by whom (Brisbin joining) the land was, on October 16, 1868, conveyed, by warranty deed, to plaintiffs for \$1,000, \$400 of which was retained by Brisbin for his services, and the residue paid to Guerin. These three deeds were all duly recorded on October 16 and 17, 1868.

Among others the district court found conclusions of law to the effect—*First*, that the validity of Coffin's claim against the estate of Goldsmith was established by the proceedings in the probate court, common pleas, and supreme court, before mentioned, and cannot be litigated in this action. *Second*, that Guerin's equitable lien, as vendor of the premises in controversy, growing out of the failure of title to a portion of the real estate received by him in exchange therefor, cannot prevail against the claim of Coffin, as a subsequent creditor without notice of Goldsmith, Guerin's vendee, and the defendant's title is not affected by such lien. *Third*, that, conceding that such lien, if properly enforced, would have been paramount to the claims of subsequent creditors of the vendee, still the lien has not been in any manner enforced. Goldsmith, at the time of his death, had an interest in the premises liable to be sold for the payment of his debts. That interest

having been sold, the purchaser takes it, and will hold the land until the vendor's lien has been legally enforced, which cannot be done in this action. *Fourth*, that the deed executed by Sarah Goldsmith, as executrix and devisee, under which plaintiff's claim, is inoperative as a conveyance of the premises in controversy, and defendant's title is not affected thereby. *Fifth*, that defendant is owner in fee-simple of said premises, and plaintiffs have no estate, title, or interest therein.

These findings are, in our opinion, correct. The first is directly supported by *State v. Ramsey County Probate Court*, 25 Minn. 22. The second is simply an application of the well-settled rule that a vendor's lien upon real estate does not prevail against a creditor of the purchaser, whose claim accrued subsequently to the lien, and without notice of it. 2 Washburn Real Prop. c. 16, § 3, subd. 13; *Bayley v. Greenleaf*, 7 Wheat. 46; *Webb v. Robinson*, 14 Ga. 216; *Chance v. McWhorter*, 26 Ga. 315; *Perry on Trusts*, § 239. The third and fourth are supported directly or by necessary inference by *State v. Ramsey County Probate Court*, above cited. The fifth is an obvious consequence and result of the four preceding. The plaintiff's position, that the real estate in question was relieved of any charge or liability by the operation of the proviso of Gen. St. 1878, c. 46, § 3, is disposed of in the case cited, where that section is held not to be retroactive, but to include future cases only, and, therefore, to have no application to a claim like that of Coffin in this case. It is not improper to add that it is by no means clear that this proviso has any reference whatever to the right of a creditor of a decedent's estate to insist that the real property of the same shall be sold and applied to the payment of his debt.

One other finding of the court below remains to be noticed. The plaintiffs paid taxes duly assessed upon the premises in dispute for four years. The court finds that, not having been in possession of the premises, they are not entitled to any

relief in this action on account of such payments. As this is merely an action under the statute to determine an adverse claim, the propriety of the finding is apparent.

Judgment affirmed.

**CITY OF WINONA vs. MINNESOTA RAILWAY CONSTRUCTION
COMPANY.**

October 7, 1880.

ON REARGUMENT, JANUARY 28, 1881.

Appeal—Order allowing Amendment.—Upon an appeal from an order refusing a new trial, this court cannot review an order of the court below allowing an amendment of the pleadings made previous to the commencement of the trial, and not as a part of it.

Contract for building Truss Bridge—Strict Performance necessary.—The construction given by this court in this case, in 24 Minn. 199, of the contract between the parties on which the action is based, adhered to. The contract between the parties providing for the issue of bonds by plaintiff, to be left in escrow, and delivered to defendant when certain conditions should be performed within specified times—among others, if a railroad truss bridge should be constructed across the Mississippi river at Winona, within three years; the bonds to be returned to plaintiff if such bridge should not be constructed within said time, no other but a railroad truss bridge, even though as good as, or even better than, such a bridge for the use intended, and even though of the kind used at other points on the river, will meet the requirements of the contract.

Same—Acceptance of different Bridge, if relied on, must be pleaded.—The fact of an acceptance of, and acquiescence in, the bridge actually constructed as a compliance with the contract not being found by the court below nor alleged in the pleadings, and it not appearing that on the trial it was treated as an issue in the case and litigated, this court will not consider the evidence, though it may be very strong, tending to show such acceptance and acquiescence.

Estoppel—Findings on former Trial—Judgment between other Parties.—Findings of fact on a former trial of the case, they having been set aside and a new trial ordered, cannot be an estoppel as to the facts so found on the second trial. A judgment on the same issues, in an action by one through whom this defendant does not claim against this plaintiff, is no estoppel as to such issues in this action.

27	415
40	177
27	415
51	39
27	415
164	68
27	415
e86	392

Evidence—Expert.—The structure in question being composed in part of trusses and in part of trestles, and it being a litigated question whether under the trestles was river or an island, one party contending that the whole under both trusses and trestles was river, and the other party that under the trestles was island, it was improper to ask an expert witness, called to testify to the character of the bridge, this question, “Was that bridge, constructed as you have described it, a truss railroad bridge across the Mississippi river at Winona?” because it involved the witness’ opinion or determination of whether under the structure was wholly river, or partly river and partly island—not a matter for expert evidence.

ON REARGUMENT.

Trial of Issues not made by Pleadings.—The parties to a cause may by consent try an issue of fact not made by the pleadings, and, if they do, the cause is to be decided as it would be if the pleadings made the issue. But where there is no formal or express waiver of the omission in the pleadings, and it is to be gathered, if at all, by the course of the trial, the record must make it appear very clearly that the parties did in fact and without objection litigate the issue as though it were in the pleadings.

This action was originally brought in August, 1874, against the Minnesota Railway Construction Company and Horace Thompson, to recover damages for the conversion, by the defendants, of certain negotiable bonds, with interest coupons attached, to the amount in the aggregate of \$100,000, which had been executed by the plaintiff and deposited with the defendant Thompson, cashier of the First National Bank of St. Paul, to be held by him in escrow until the performance by the construction company of a contract made by it with the plaintiff on April 23, 1870, and, upon full performance of that contract, to be delivered to the construction company.

By the terms of the contract, the plaintiff, to aid the company in the construction of the railway from St. Paul to Winona, known as the St. Paul & Chicago railway, agreed to execute the bonds in question and deposit them in escrow, and the company agreed to build, equip and put in operation, within three years from the date of the contract, a good and substantial railway from St. Paul to Winona, and to connect at Winona by bridge or ferry with the La Crosse, Trempealeau & Prescott railroad. The contract contained

certain minor provisions as to the completion of certain parts of the railway, and provided as follows in regard to the delivery of the bonds by the depository: "It is further agreed as to the delivery of said bonds as follows: * * *Third*—That if a railroad is not built, equipped and put into operation from St. Paul to Winona (except the bridge at Hastings) as aforesaid, connecting at Winona, by bridge or ferry, with the La Crosse, Trempealeau & Prescott railroad, within three years from this date, then and in that event the said bonds and coupons shall be by said depository returned to said city of Winona, or to its duly authorized agents; but in no case shall the said bonds, or any part thereof, be delivered by said depository to the said Minnesota Railway Construction Company until a truss bridge is constructed across the Mississippi river at Winona, connecting the said St. Paul & Chicago railway, or the Winona & St. Peter railroad, with the La Crosse, Trempealeau & Prescott railroad, at the present terminus of the last-named railroad. But if, in each and every of the respects above mentioned, the said railroads and several parts of said railroads are built, equipped and put into operation within the times and in the manner above agreed, and said railroad bridge constructed as above provided, then and in that event, and in that event only, shall the said bonds be delivered to the said Minnesota Railway Construction Company by said depository."

On March 27, 1872, the construction company, claiming to have fully performed the conditions entitling it to the bonds, demanded and received them from the defendant Thompson. This action was brought in August, 1874. In its original complaint the plaintiff alleges the making of the contract, (a copy of which is attached to the complaint as Exhibit A;) that the company, when it obtained the bonds from Thompson, had not performed the acts which by the contract were made a condition precedent to the delivery of the bonds to it; that the company had not then nor has it yet built, equipped and put in operation a good and substan-

tial railway from St. Paul to Winona; nor built and equipped, or caused to be built and equipped, any railway from St. Paul to Winona and connected said railway, at Winona, by bridge or ferry, with the La Crosse, Trempealeau & Prescott railroad; that there was not then, nor has there yet been built, equipped and put into operation from St. Paul to Winona a good and substantial railway, or any railway, connecting at Winona with the La Crosse, Trempealeau & Prescott railroad; that the defendant company has not built or caused to be built, or aided in any manner in building, a bridge across the Mississippi river at Winona or elsewhere, connecting said railroad from St. Paul to Winona, or any railroad, with the La Crosse, Trempealeau & Prescott railroad; that the defendant company has not, nor had it at any time, put on, or caused to be put on, or aided in putting on, any ferry on the Mississippi river, at Winona or elsewhere, connecting such railway from St. Paul to Winona, or any railroad, with the La Crosse, Trempealeau & Prescott railroad; nor has it ever put on, or caused to be put on, or in any manner aided in putting on, any ferry on the Mississippi river at Winona, or within twenty miles of the city of Winona.

The defendants in their answers to this complaint averred full performance of all the conditions prior to the delivery of the bonds. The issues raised by these pleadings were tried, and judgment ordered for the plaintiff, and defendants' motion for a new trial denied. On appeal to this court, the order denying a new trial was reversed. See *City of Winona v. Thompson*, 24 Minn. 199, where the questions then made upon this contract are fully stated.

The case having been remanded to the district court, the plaintiff, in January, 1878, applied for and obtained leave to amend its complaint by setting up an alleged scrivener's error in drafting the contract, by reason of which it failed to express the agreement of the parties, and by inserting the following averment: "Nor had the Minnesota Railway Construction Company, or any other company or

person, on the twenty-eighth day of March, 1872, or on the twenty-fourth day of April, 1873, or at any time before the commencement of this action, constructed or caused to be constructed across the Mississippi river, at Winona, or elsewhere, a truss railroad bridge connecting the said St. Paul & Chicago railway, or the Winona & St. Peter railroad, with the La Crosse, Trempealeau & Prescott railroad, at the terminus of the last-named railroad, as the same was fixed on the twenty-third day of April, 1870, or elsewhere." As a condition of the leave to make the first of these amendments, the plaintiff was required to and did dismiss the action as against the defendant Thompson. The construction company appealed from the order allowing the amendments, but the appeal was dismissed, (25 Minn. 328,) and it thereupon answered the amended complaint, putting in issue the alleged mistake, alleging in detail performance of each of the conditions of the contract, and alleging as follows in regard to the truss bridge at Winona: "That long previous to said last-named date," (March 27, 1872,) "a truss railroad bridge was constructed across the Mississippi river at said Winona, connecting the said St. Paul & Chicago railway and the Winona & St. Peter railroad with the La Crosse, Trempealeau & Prescott railroad, at the terminus of the last-named railroad on the east bank of the Mississippi river, as said terminus was fixed at the date of said contract, Exhibit A; and defendant further alleges that said truss railroad bridge, so constructed as aforesaid, has, ever since the same was so constructed, been maintained, renewed and repaired, and was at the time of the commencement of this action, and still is, so maintained and in operation for the passage of railroad trains across the Mississippi river at said Winona."

In answer to the averments of mistake in the contract, the answer further alleges that "the plaintiff has, ever since said contract was executed, adopted the same in the form and language in which it now is, and asserted and claimed

rights thereunder, and has never until the month of January, 1878, pretended or claimed that said contract was not in all things the exact record and evidence of the contract and agreement that was entered into by and between said parties plaintiff and defendant hereto; nor has the said plaintiff, until about the date last aforesaid, ever pretended or claimed that there was any mistake in the preparation or drawing of said contract, but has frequently ratified, adopted, and confirmed said contract, and predicated rights thereunder, in this, to wit." After alleging that the plaintiff pleaded this contract and claimed rights thereunder in a suit brought against it by one Cowdrey, on certain coupons of the bonds in question, in the United States circuit court for Minnesota, the answer proceeds: "And defendant avers that on account of the adoption, ratification and confirmation of said contract in its present shape by said plaintiff, as aforesaid, and by commencing this action thereon, and prosecuting the same to a hearing and determination on the merits, and by other acts of ratification and confirmation of said contract by said plaintiff, the said plaintiff is estopped from now claiming that said contract does not express the agreement and understanding of the parties thereto, and from asserting that there was any mistake made therein, and from asking any reformation thereof."

For a second defence the answer alleges a suit brought in May, 1873, by one Cowdrey against the plaintiff, in the circuit court of the United States for Minnesota, on certain coupons of the bonds in question; that, as a defence to that suit, the city pleaded the same matters alleged in its amended complaint in this action; that it was conceded at the trial that Cowdrey took the coupons when past due, and that they were subject, in his hands, to the defence so made to them. That the action was tried on the merits, and all the issues were decided and adjudged against the city and in favor of Cowdrey, who recovered judgment against the city for the full amount of his coupons, with interest and costs, which judg-

ment was, on writ of error, in all things affirmed by the supreme court of the United States, and that by reason of these proceedings and judgments, the plaintiff ought not to have or maintain the present action.

A jury having been waived, the issues made by the amended pleadings were tried in the district court for Steele county, by *Stearns, J.*, acting for the judge of the 5th district, who found the disputed facts as follows:

"4th. That on the 23rd day of April, A. D. 1870, the plaintiff entered into a written contract with the defendant, a copy of which is attached to the complaint and marked Exhibit A.

"8th. That no truss railroad bridge was constructed across the Mississippi river, at Winona or elsewhere, connecting the St. Paul & Chicago railway or the Winona & St. Peter railroad with the La Crosse, Trempealeau & Prescott railroad at its then terminus or elsewhere, within three years after the making of said contract 'Exhibit A.'

"9th. That at the time of the making of said contract, the eastern terminus of the Winona & St. Peter railroad was on the western bank of the Mississippi river in the city of Winona; and the terminus of the La Crosse, Trempealeau & Prescott railroad therein mentioned was on the eastern bank of said river, about 2,575 feet eastwardly from said terminus of the Winona & St. Peter railroad.

"10th. That a line drawn from said terminus of the Winona & St. Peter railroad to said terminus of the La Crosse, Trempealeau & Prescott railroad crossed the lower end of a sand bar in the bed of the Mississippi river, which, at low water in said river, formed an island with about 60 acres surface, composed exclusively of sand drifted there by the currents of the river, upon which there was no soil or fixed land, and no vegetation or trees except some bunches of willows at the upper end of said island; which said sand-bar island is overflowed at ordinary high water in said river, and is overflowed to the depth of 14 feet by extraordinary high water in said river.

"11th. That prior to the delivery of said bonds and coupons to the defendant, as aforesaid, a bridge had been constructed along said line connecting the said termini—all of which was truss railroad bridge except 1,000 feet in length thereof, which was not truss bridging, but was constructed on piles and is known as pile bridging; and a little less than 800 feet in length of said pile bridging was over a part of said sand bar which was above low-water mark in said river, and a little more than 200 feet in length thereof was over a part of said sand bar which was below said low-water mark. Said pile bridging cost about \$25,000 less than good truss bridging over the same space would have cost, and was not a substantial equivalent for truss bridging in that place; but the said pile bridging was used for the passage of railway trains until, during the years 1875 and 1876, it was removed, and truss bridging substituted in its place.

"12th. That all things requisite to be done to entitle the said defendant to receive said bonds and coupons under the provisions of said contract had been done prior to the 27th day of March, A. D. 1872, except the constructing of said railroad bridge as provided in said contract."

As a conclusion of law the court held that the plaintiff was entitled to recover the sum of \$101,450, with interest from March 27, 1872, the date of the conversion.

The defendant moved for a new trial, which was refused, and it appealed from the order denying the motion.

At the trial the defendant introduced in evidence the record of a suit brought in the U. S. circuit court for Minnesota against plaintiff by one Cowdrey as holder of coupons of some of the bonds in question in this case, in which suit Cowdrey had judgment, which was afterwards affirmed in the supreme court. In its answer in that suit, (made in July, 1873,) the city set forth the contract with the construction company, and alleged and relied on the same omissions pleaded in the original complaint in this suit, and did not

allege any failure of the construction company to build a truss bridge across the Mississippi river at Winona.

The defendant also proved that the plaintiff had in the month of September in each of the years 1870, 1871, 1872, 1873, levied taxes to pay the interest on the bonds in question, and that on May 22, 1871, the common council of the city "appropriated to the citizens' committee, having in charge the proposed celebration on the opening of the railway bridge across the Mississippi river at this point, a sum not to exceed \$500, to aid in defraying the expenses of such celebration," and that the railway bridge, the opening of which was thus celebrated, was the bridge in question in this action.

Bigelow, Flandrau & Clark, for appellant.

Thomas Wilson, for respondent.

GILFILLAN, C. J. Although an expression used by the court in dismissing the appeal from the order allowing an amendment to the complaint in this case (25 Minn. 328) may indicate a different rule, we are satisfied that an order made previous to the commencement of a trial, and not as a part of it, granting an application for leave to amend the pleadings, cannot be reconsidered by the court below on a motion for a new trial. The abuse of discretion mentioned in Gen. St. 1878, c. 66, § 253, as ground for a new trial, is an abuse of discretion happening at the trial, which prevents a fair trial of the issues as they exist when the trial commences; and on an appeal from an order granting or refusing a new trial, this court can review only what was properly before the court below for consideration on the motion. Therefore we cannot consider, on this appeal, the point made that the court below improperly allowed the amendments to the complaint.

The contract on which this action is based has certainly been fruitful of controversy and difference of opinion as to its proper interpretation. This was caused by the fact, as appears from the contract itself, that after a draft of a contract was

made, the parties, before executing it, inserted other clauses conflicting to some extent with clauses already in the draft, and then, without striking out or changing these latter clauses, executed the contract.

That the truss bridge mentioned in the contract was, to entitle the construction company to the bonds, to be constructed within three years from the date of the contract, is settled by the interpretation given the contract both by the supreme court of the United States in *City of Winona v. Coudrey*, 93 U. S. 612, and this court when this case was before it on a former occasion. 24 Minn. 199. Those decisions, and especially that of this court, are to the effect that the crossing of the river on a truss bridge, and connection with the La Crosse, Trempealeau & Prescott railroad over such bridge, by means of the track of either the St. Paul & Chicago railway or the Winona & St. Peter railroad, were, by the clauses inserted after the draft of the contract was made, substituted for the passing of the river by bridge or ferry, and connection by means alone of the St. Paul & Chicago railway. The connection by the mode contemplated in the original draft was to be made within three years, otherwise the bonds were to be returned by the depository to the city. When another mode of connection was substituted, the stipulation that the connection should be made within three years was left unchanged.

Only one bridge was built, and by means of that, and of the Winona & St. Peter railroad, the connection with the La Crosse, Trempealeau & Prescott railroad was made. If this was not a truss railroad bridge, it did not meet the requirements of the contract. Plaintiff contracted for that kind of bridge, and, without its consent, no other kind, although equally as good, or even better than a truss bridge, and although of the kind used in crossing the river at other points, could be substituted for the kind it contracted for. This disposes not only of one of the points made by defendant on

the evidence, but of some points on exceptions taken to rulings upon evidence offered by defendant, and we need not further refer to such points.

The defendant claims that the plaintiff accepted and acquiesced in the bridge which was in fact constructed, as a compliance with the contract. So far as the evidence in the case bears on this proposition, it is certainly very cogent that, up to the plaintiff's amendment of the complaint, the parties regarded the bridge actually constructed as the kind of bridge called for by the contract; but the fact of such acceptance and acquiescence is not found by the court below. It is not alleged in the answer, which relies on the allegation that a truss railroad bridge was actually constructed within the three years; and it does not appear that, on the trial, it was treated as an issue in the case, and the fact litigated as though it were alleged in the pleadings; therefore, we cannot consider the evidence tending to show it.

The court below has found as a fact that no truss bridge was constructed within the three years, and that the bridge actually constructed and used to make the required connection was not a truss bridge. There is certainly sufficient evidence to sustain this finding. The findings of the court on the first trial, they having been set aside, of course cannot be an estoppel; and the judgment in the *Cowdrey Case*, the parties not being the same as in this case, and this defendant not claiming under *Cowdrey*, is no estoppel.

Of the points made on exceptions to rulings of the court below, excluding evidence offered by defendant, we need notice specially but one. On the trial, defendant introduced several expert witnesses and put to them questions like this: "Was that bridge, constructed as you have described it, a truss railroad bridge across the Mississippi river at Winona?" Under the circumstances of the case, the words "across the Mississippi river at Winona" vitiate the question, because they include in it a question of fact, which was one of the litigated

facts in the case. The bridge extending from the west to the east bank of the river was composed, commencing at its west end, first of several hundred feet of trusses; then of about 1,000 feet of trestles; then of more trusses, and after that of more trestles. The part under the 1,000 feet of trestles was claimed by plaintiff to be river, by defendant to be an island in the river; and whether, in fact and law, river or not, was sharply litigated. If the part under the trestles was no part of the river, and all of the river was spanned by the trusses, defendant claimed — no doubt correctly — that the bridge across the river was a truss bridge. If the part under the trestles was river, plaintiff claimed the truss bridge did not extend across the river. How a witness would answer such a question as that put would probably depend on the view he took of the litigated fact, was the part under the trestles river? All such questions were properly excluded.

Order affirmed.

The defendant having moved for a reargument, the following order was made:

“Ordered, that there be a reargument of this cause upon the following propositions:

“Is the evidence in the case—that after the construction of the railroad bridge across the Mississippi river at Winona, the plaintiff accepted or acquiesced in such bridge as satisfactory under the contract, so that it is bound by such acceptance or acquiescence though the bridge was not in fact in accordance with the contract—such that, under the rule in respect to setting aside verdicts or findings of fact as contrary to evidence, this court ought to set aside the findings in this case?

“Does it appear from the record that the question of such acceptance or acquiescence was, on the trial, treated as an

issue of fact in the case as if it had been made by the pleadings?"

The cause having been reargued pursuant to this order, the following opinion was filed on January 28, 1881.

GILFILLAN, C. J. Upon the reargument allowed and had in this case, we adhere to what was at first decided, that there was no issue at the trial upon the acceptance or acquiescence in by the city of the bridge constructed across the Mississippi river at Winona, as in accordance with or satisfactory under the contract between the parties. The pleadings make no such issue. *Prima facie*, the issues tried are those made by the pleadings. The parties may, by consent, try an issue not made by the pleadings—that is, they may, when they come to trial, waive the want of formal allegations in the pleadings as to a particular fact or state of facts; and where they do so, the case is to be determined as it would be had such allegations been in the pleadings. Where there is no express or formal waiver, but it is to be gathered from the course of the trial, the record of the trial must make it appear very clearly that the parties did in fact, and without objection, litigate the issue not pleaded as though it were in the pleadings. Any other rule would be liable to operate as a surprise, and to work injustice. The record in this case does not make it appear that the issue in question was litigated at the trial. The mere fact that evidence which would tend to prove that issue was offered and received, is not enough, for all the evidence to which our attention is called upon this point was admissible, if admissible upon any conceivable issue, upon those made by the pleadings, and it is presumed to have been offered and received upon them.

The decision of the case heretofore made is adhered to.

27	428
46	307
27	428
79	87

GEISER THRESHING MACHINE COMPANY vs. S. D. FARMER and others.

January 31, 1881.

Sale with Warranty—Splitting up single Cause of Action on indivisible Contract.—Plaintiff sold to defendants a threshing machine, with a warranty of quality, and an agreement (as claimed) that, in case the machine did not correspond to the warranty, the plaintiff would put it in order so that it should conform to the warranty; and also that in case plaintiff's failure to fulfil its contract, that plaintiff would surrender the promissory notes which were given by defendants for the price of the machine, take the machine away, and that the contract of sale and notes should be void. *Held*, that the contract between the parties, though consisting of several parts, was one and indivisible; that the defendants' right of action upon it was, therefore, one and indivisible also; and that, therefore, the defendants could not split it and maintain an action at one time for the recovery of a part of the damages arising from its breach, and another action at another time for the recovery of another part of such damages.

Same—Where Breach is pleaded as a Defence.—Also that, as respects the application of this rule, there is no difference between setting up the breach of such contract as a plaintiff's cause of action in a complaint, and setting it up as a defendant's defence in an answer.

Same—Former Judgment for Same Breach.—It appeared in this case that the defendants executed three promissory notes for the price of the machine mentioned; that an action had been brought on the note first due, in which the defendants had set up damages arising from the breach of warranty before mentioned as a defence, and that thereupon judgment had been rendered for defendants upon a verdict of no cause of action in the plaintiff. *Held*, that in the present action upon the remaining two notes, the judgment in the former action estops the defendants from setting up in defence any breach of the contract upon plaintiff's part.

Appeal by defendants from an order of the district court for Brown county, *Macdonald*, J., presiding, (acting for the judge of the 9th district,) refusing a new trial.

B. F. Webber, for appellants.

S. L. Pierce and *J. Newhart* for respondent.

BERRY, J. The defendants executed three promissory notes running to plaintiff, all at the same time, and for one and the same consideration. This action is brought upon

the two notes last falling due. Upon the other note an action had been previously brought, which resulted in a verdict of no cause of action, upon which judgment was entered in favor of the defendants for their costs. As defences in the former action, the defendants alleged that the sole consideration of the note sued on was the sale by plaintiff to defendants of a threshing machine, with a warranty that the machine was in all respects a first-class machine, capable of doing first-class and satisfactory work as a threshing machine, not liable to get out of order or break, and that it would do clean, clear and satisfactory work in all respects. Defendants further alleged that it was not a first-class machine; that it would not do good, clean, clear, satisfactory work; that it was liable to get out of order; that for the purpose for which such machine was sold by these plaintiffs to the defendants, it was worthless and unfit, defective, and a fraud upon the defendants. Defendants further alleged that by reason of the imperfections specified, and by reason of its defectiveness and worthlessness as a machine for threshing, they were put to great labor, expense, delay and loss of time in attempting to use the machine, which delay, labor and loss of time were reasonably worth \$375, which sum they offered to recoup and set off against such note and interest, or such sum as should be found due thereon. These allegations of this answer as to the character of the machine are, in effect, nothing more than allegations of a breach of the alleged warranty. The allegation that, for the *purpose for which the machine was sold*, it was worthless, is only an allegation that the alleged warranty that it was a first-class machine, and capable of doing first-class work, etc., was untrue, and that therefore the warranty was broken.

In the present action, defendants in their answer alleged the warranty as before, adding, however, that, as a part of the contract of sale, and of the consideration of the notes, plaintiff agreed that he would send a competent mechanic to

put the machine in repair and running order, so that it should in all respects conform to the warranty; and that, in case of a failure to comply in any respect, or in case of the failure of plaintiff to fulfil any part of its contract, plaintiff would surrender to defendants all said notes and take away the machine, and that the contract of sale and the notes should be void. The answer alleges the falsity of the warranty, and the worthlessness of the machine as a threshing machine; and, further, that, though often requested by defendants, plaintiff has neglected and refused to send any person to put said machine in repair or running order, and to start the same; and that by reason of the breach of warranty defendants suffered damage in the sum of \$675.21. The answer also sets up the former judgment. The defendants upon the trial introduced the judgment in evidence, so that it speaks for itself; and if in any respect it varies from the allegations of the answer in regard to its contents and effect, the judgment controls.

The contract, on the part of the plaintiff, was a contract of sale, accompanied by warranty, and, according to the second answer, by the agreement as to the surrender of the notes, the taking away of the machine, and that the sale and the notes should be void. This contract, though consisting, according to the answer, of several parts, was one and indivisible. The whole of it was entered into at one time, between the plaintiff on the one hand and the defendants on the other, and upon one consideration. As it was one and indivisible, the defendants' right of action upon it was one and indivisible also. They could not split it and maintain one action at one time for the recovery of a part of the damages arising from its breach, and another action at another time for the recovery of another part of such damages. *Thompson v. Myrick*, 24 Minn. 4. As respects the application of this rule, there is no difference between setting up the breach of such a contract as a plaintiff's cause of action in a complaint and setting it up as a defendant's defence in an answer.

In the latter case the defendant is asserting a cause of action on account of the breach, just as much as he would have been if he had brought an action for it as plaintiff. In the case at bar it appeared, upon the production of the former judgment, that the defendant had availed himself in part of the breach of the plaintiff's contract as a defence in the former action. It follows that he is estopped to avail himself in another part of such breach as a defence in this action. As the making of the two notes in suit was admitted, and as the defendant was thus estopped to avail himself of the defences set up in his answer, it follows that, upon the production of the judgment, the plaintiff was entitled to judgment for the amount of the notes. This conclusively disposes of the case, and renders it unnecessary to consider the other matters presented upon the argument.

Order affirmed.

CHARLES B. SOLBERG vs. CHRISTIAN PETERSON and another.

February 3, 1881.

Chattel Mortgage in Fraud of Creditors.—Evidence in this case *held* sufficient to sustain the finding, that a certain chattel mortgage was fraudulent as respected the mortgagor's creditors, and also to sustain the finding as to the value of the mortgaged goods.

On May 1, 1878, Jacob Olson made and delivered to the plaintiff a chattel mortgage upon all his stock in business. On May 4, 1878, the defendant, as sheriff of Fillmore county, seized the stock of goods, which was still in the possession of Olson, under certain writs of attachment issued in favor of the creditors of Olson. On the same day, claiming under his chattel mortgage, the plaintiff brought this action in the district court for said county to recover possession of the stock.

Upon the trial before *Page, J.*, a jury being waived, Olson testified in behalf of defendant: "I had an inventory made about the time when the mortgage was given. We valued it (the stock) at about \$3,300. * * * That was the stock just when I mortgaged it, and that is what the sheriff attached. I owed Mr. Solberg at that time \$1,100 or \$1,200, I guess. * * * He told me he wanted the mortgage to save his pay, and I told him I would like to run along so that I could get the money and collect my bills that were out. * * * He said if I gave a mortgage to him, the other creditors could not break me up, that was the reason he wanted me to give a mortgage." On cross-examination: "I remember refusing and saying I would not give a mortgage under any circumstances. I thought it was too much interest. * * * He was to help me and force a settlement with my creditors." The court found the mortgage fraudulent as to Olson's creditors, and ordered judgment against plaintiff. A motion for a new trial was denied by *Farmer, J.*, and the plaintiff appealed.

E. N. Donaldson, for appellant.

C. N. Enos, for respondent.

BERRY, J. There is sufficient evidence in this case that the chattel mortgage was made, not only for the purpose of securing the plaintiff's claim, but also for the purpose of putting the mortgaged property out of the reach of the mortgagor's other creditors, and hindering and delaying them in the collection of their demands, and, probably, of forcing such creditors to a settlement of some kind. That this evidence is contradicted is not important. As to the value of the mortgaged goods, the evidence goes to show that at or just about the time when the mortgage was executed, an invoice was made, in taking which both plaintiff and the mortgagor participated, finding the goods to be worth \$3,300, and that the goods so valued constituted "the stock" mortgaged. It further appears that the plaintiff took possession of the goods, and foreclosed his mort-

gage by selling the same. In these circumstances, as there is no evidence attacking or impugning the correctness of the invoice valuation, we think it sufficient to uphold the value adjudged by the court below, to wit, \$3,000.

Order affirmed.

DELIA G. RYAN vs. SCHOOL-DISTRICT No. 13 OF DAKOTA
COUNTY.

February 3, 1881.

Common-School Teacher—Certificate of Qualification—Action by Teacher.—

Laws 1879, c. 17, § 2, provides that a common school-district shall hire "such teachers only as have certificates of qualification." *Held*, following *Jenness v. School-district*, 12 Minn. 448, that a contract to hire a teacher not having a certificate is unauthorized and void; also, that in a complaint upon a contract alleged to have been entered into between a school-district and a teacher, whereby the former hired the latter to teach a school, an allegation that the teacher had such certificate is necessary to the statement of a cause of action.

Same—Requisites in Complaint.—

That an allegation that the school-district and the teacher "entered into an agreement in writing," implies that the statutory directions as to the way and manner in which it was to be entered into on the part of the district have been complied with.

Same—Contract—Signatures of School-district Officers.—

That where such an agreement purports upon its face to have been made by the school-district and teacher, and is signed by the latter, and by "J. Q., Director," and "J. S., Treasurer," the implication is that Q. and S. are respectively director and treasurer of the district, and therefore two of its board of trustees, such as are authorized by statute to make contracts for the district in the manner provided by law.

Appeal by plaintiff from an order of the district court for Ramsey county, *Brill*, J., presiding, sustaining the defendant's demurrer to the complaint.

Smith & Egan, for appellant.

Davis, O'Brien & Wilson, for respondent.

BERRY, J. This is an action upon a contract alleged to have been entered into between the plaintiff and the defend-

ant, whereby the latter hired the former to teach a school. Laws 1879, c. 17, § 2, provides that a common school-district shall hire "such teachers only as have certificates of qualification," and it follows that a contract to hire a teacher not having a certificate is unauthorized, and therefore void. *Jenness v. School-district*, 12 Minn. 448. As the possession of the certificate is necessary to the validity of the contract, the allegation of such possession is necessary to the statement of a cause of action upon such contract. For lack of such allegation the complaint in this action was properly held demurrable.

As it is possible that the complaint may be amended so as to cure the defect above mentioned, it is best to consider also the other objections urged in support of the demurrer. It is objected that the complaint does not show that the plaintiff was hired by the trustees at a meeting called for that purpose, nor that there was any meeting of the trustees, or that notice thereof was given, all as required by statute. But the complaint alleges that the plaintiff and defendant—i. e., the school-district—"entered into an agreement in writing," a copy of which is made part of the complaint. This implies that the necessary statutory directions were complied with, for in no other way could the district *enter into* the agreement. The agreement purports upon its face to have been made by the plaintiff and defendant, and is signed by the latter, and by "James Quirk, Director," and "James Slater, Treasurer." It being alleged, as before stated, that defendant "entered into" the agreement signed in this way, it is necessarily implied that Quirk and Slater are respectively defendant's director and treasurer, and therefore two of its board of trustees, such as are authorized by Laws 1879, c. 17, § 1, to make contracts for the district in the manner pointed out by statute.

Order affirmed.

MARY A. CANNADY vs. MATTHEW LYNCH and wife.

February 5, 1881.

Competency of Witness—Of Unsound Mind.—Gen. St. 1878, c. 73, § 9, subd. 1, disqualifies persons of unsound mind or intoxicated to be witnesses only when unsound or intoxicated to a degree that would exclude them at common law. Persons are competent if, when offered, they have such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong sufficient to appreciate the sanctity and binding force and obligation of an oath.

27	435
53	537
27	435
73	138

Same—Competency—How Determined.—The trial court must determine a witness' competency when he is offered,—the pleadings do not determine it. The trial court need not examine a witness as to his fitness to testify unless, when he is offered, it see some indication of his unfitness.

Practice—Objections to Evidence.—Application of the rule that objections to evidence offered must be definitely stated.

Witness as to Appearance of Person whose Sanity is in Question.—The question, does a person appear to be well or ill, or does he act like a sane or insane person? may be asked of any witness who has observed the fact, though he be not an expert.

Plaintiff brought this action in the district court for McLeod county, to recover damages for ill-treatment by the defendants, with whom she had lived for several years. The case was tried before *Macdonald, J.*, and a jury, who returned a verdict for plaintiff for \$5,000. The defendants moved for a new trial, which was denied, and they appealed.

In her complaint plaintiff alleged: "That, by reason and in consequence of the said several acts and doings committed by defendants, as aforesaid, plaintiff has suffered," etc., "and that plaintiff became deranged in her mind, and became insane, and was adjudged to be insane by the probate court of Washington county, Minnesota, and was sent, by order of said court, to the asylum for the insane, at St. Peter, where she is informed and believes she was confined as an insane person for about two years, and that she was discharged

therefrom in the month of May, 1879. That plaintiff is informed and believes that, by reason of the several acts and doings of the defendants, as aforesaid, she will always be weak in mind and body," etc. The plaintiff was sworn as a witness, and the defendants objected to her testifying, because it appeared from her complaint that she came within the provision of statute (Gen. St. 1878, c. 73, § 9,) excluding a person of unsound mind from being a witness. The objection was overruled, and defendants excepted.

J. V. V. Lewis and *H. J. Peck*, for appellants.

Edson & Little, for respondent.

GILFILLAN, C. J. The statute (Gen. St. 1878, c. 73, § 7,) provides: "All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses." Section 9 provides: "The following persons are not competent to testify in any action or proceeding: *First*, those who are of unsound mind, or intoxicated, at the time of their production for examination." At common law the rule of exclusion, so far as it related to such persons, was: "All persons who are examined as witnesses must be fully possessed of their understanding,—that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, while under the influence of their malady, not possessing this share of understanding, are excluded;" and it was the same with intoxicated persons. *Hartford v. Palmer*, 16 John. 142.

The rule of qualification under the statute is more liberal and less exclusive than at common law. It admits to be witnesses many who, at common law, would be incompetent. It would be contrary to the general tenor and spirit of the statute to construe the first subdivision of section 9 as intending to exclude, on account of mental unsoundness or intoxication, those who, at common law, would be competent. The terms "of unsound mind" and "intoxicated" are very indefinite. It

is a matter of common observation that persons may be mentally unsound on some subjects, and as to others as sound as people generally; or may be in some degree unsound, or to some extent intoxicated, and yet be capable of recollecting past events accurately, and possess the ability and appreciate the duty to relate them truly, as fully as persons who are sober, and in all respects of sound mind. It is not to be supposed that the statute intends to disqualify such persons. It is more reasonable to suppose it intends to exclude persons as witnesses only when unsound or intoxicated to a degree that would exclude them at common law; that it intends to affirm the common-law rule on the subject, and admit persons as witnesses when, at the time they are offered to be sworn, they are possessed of "such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong" sufficient to appreciate the sanctity and binding force and obligation of an oath.

If a person offered as a witness must be tested by this rule, it is evident the test must be applied by the trial court at the time of offering him. His condition at that time must determine his competency. This cannot be established by the allegations of the pleadings. It is not the purpose or office of pleadings to ascertain or make or present any issue on the competency of witnesses to be sworn on the trial. The trial court may take into account the allegations and admissions in the pleadings bearing on the mental condition of any person offered as a witness, as it may resort to any other evidence to ascertain the fact; but they are not to be taken as conclusively determining such condition. The court below did not err in overruling defendants' objection to plaintiff as a witness, based on the allegation in her complaint that she at one time became insane. It was not the duty of the trial court to examine plaintiff as to her mental soundness, merely because defendant alleged her to be unsound, unless it saw in her some indication of unfitness to testify. It must be pre-

sumed that the court declined to examine her because it saw no such indication. The testimony (hers, and that of the other witnesses,) so far as appears by the record, justified the action of the court.

Two of the defendants' exceptions may be decided together. Both were to the overruling of objections to questions put to Dr. Dorsey, a witness for plaintiff. Plaintiff had testified to blows inflicted by defendants on one of her arms, without specifying whether the right or left. Other witnesses had testified to marks and bruises, after the alleged striking, on one of her arms, without specifying which arm. At the trial she exhibited both arms to the jury. One of them seems to have attracted notice from its having apparently sustained some injury. The question to the witness was, "Will you state to the jury what is the matter of that arm?" This was objected to as incompetent and immaterial. The specific objection to its materiality here is that it does not appear from the evidence that the arm referred to was the one struck by defendants. There being evidence that, soon after the alleged ill-treatment of plaintiff by defendants, she became subject to hysteria, and Dr. Dorsey having testified that he had heard all the testimony in the case, plaintiff's counsel asked him this question: "Assuming the testimony given here to be true as to the treatment of this plaintiff by the defendants, would that have any tendency to produce the hysteria?" The objection on the trial was that it was "incompetent and immaterial." The specific objection made here is that the question includes all the "treatment," good and bad,—some acts of which, such as boarding, lodging and clothing plaintiff, are not complained of as wrongful,—and that the cause of the hysteria was immaterial, unless it was defendants' wrongful acts. This objection, had it been expressed at the trial, would have been rather hypercritical. The objection made below to each of the questions, that it was "incompetent and immaterial," was not sufficiently definite to present to the court below the precise point of objection made here.

This court has laid down the rule that "a party objecting to the introduction of evidence must state his point so definitely that the court may intelligently rule upon it, and the opposite party may, if the case will admit of it, remove the objection by other evidence." *Gilbert v. Thompson*, 14 Minn. 544. This is a rule which tends to promote frankness and fair-dealing in trial of causes. Evidence offered may be so manifestly immaterial that merely mentioning the general designation "immaterial" will direct attention at once to the precise point intended; as if, in an action on a promissory note, evidence of an assault were offered. But it often happens that evidence, otherwise proper, may be technically immaterial, because of the want of evidence of some fact to connect it with the matters in controversy. Where, as in this case, a considerable time has been occupied, and a good deal of evidence taken in the trial, the general objection to evidence offered, that it is immaterial, may not, and in this case it is evident it did not, direct the attention of the court and opposite party to a defect in the evidence already taken. We are satisfied that neither the court below nor the plaintiff's counsel understood by the objection made that defendants claimed the evidence did not show that the arm referred to in the question was the arm struck by defendants, and we doubt if it was in the mind of defendants' counsel when the objection was made. Had the objection been stated below as definitely as it is presented here, two or three words of testimony might have removed it. Had the objection urged here against the second question we have quoted been made below as definitely as here, the insertion of a single word—the word "ill" before the word "treatment"—would have removed the objection, which, as made here, is rather to the form or phraseology of the question than to the character of evidence indicated by it.

In the case of each question the specific point made here presents a point which we are satisfied was not presented to the mind of the court below, nor of the plaintiff's counsel,

and we will therefore not consider whether there is or is not anything in the point.

The questions as to the apparent physical condition of plaintiff, and as to whether she acted like a sane or insane person, were such that any witness, though not an expert, might answer if he knew the facts. That a person appears to be well or ill, or that he acts sanely or otherwise, are things open to the senses and observation, and do not require scientific or special knowledge to determine. The evidence as to plaintiff's ailments offered by plaintiff, and objected to by defendants, even if objectionable, could not have done any harm, for there does not appear to have been any controversy as to the fact. The defendants' witnesses testified to it as fully as plaintiff's witnesses, so far as regarded the ailments. The only controversy appears to have been as to what caused them.

Order affirmed.

ANDREAS GUNNALDSON *vs.* ELLING NYHUS, impleaded, etc.

February 5, 1881.

Note for Goods Sold by Unlicensed Auctioneer.—Plaintiff employed one who had no license to act as an auctioneer to sell personal property at auction. Defendant bid in the property, and afterwards gave to plaintiff his promissory note for the amount of the bid. *Held*, the note is not void by reason of the auctioneer's violation of law in selling without a license.

Appeal by defendant, Elling Nyhus, from a judgment of the district court for Fillmore county, *Page, J.*, presiding, against himself and one Gunne Olson.

C. N. Enos, for appellant.

E. N. Donaldson, for respondent.

GILFILLAN, C. J. Action on a promissory note. The defendant appealing alleged in his answer, as one defence, the

sale at public auction, by a person not licensed as an auctioneer, and who was at the time known to plaintiff to be unlicensed, of personal property belonging to plaintiff, to the other defendant, joint maker of the note; and that the note was given for the price bid at such sale, which formed the sole consideration for the note. Evidence of this defence was objected to and excluded at the trial, on the ground that the facts so alleged constitute no defence. This is claimed to be error.

The case is unlike *Ingersoll v. Randall*, 14 Minn. 400. In that case the plaintiff sought compensation for work done in a manner prohibited by statute; to recover for doing what was a violation of law. This case would be like that of the auctioneer, were the plaintiff seeking to recover for the sale made by him without having a license. Perhaps, also, the case would come within the principle of that decision, if the defendant, whose bid was accepted, had refused to do anything further to take the property, or pay the amount of his bid, and the action were to recover it. But the fact that his bid was not binding on him, by reason that the act of the auctioneer in selling at auction without a license was prohibited, did not make it illegal for him subsequently to accept the property and make a new promise to pay for it. When sued on the new promise, the void auction sale is not the basis of the action, but the new promise. The facts pleaded did not avoid the note.

Judgment affirmed.

STATE OF MINNESOTA *ex rel.* John W. Cunningham and
others *vs.* BOARD OF PUBLIC WORKS OF THE
CITY OF ST. PAUL.

February 9, 1881.

City of St. Paul—Assessment for Local Improvements—Objections to Confirmation—Powers of Board of Public Works—Certiorari.—Under the provisions of the charter of the city of St. Paul relating to assessments for such local improvements as street grading, when the report of the city treasurer comes into the district court, any person interested may appear and file objections to the recovery of judgment. Objections relating to proceedings prior to the confirmation of the assessment by the board of public works, can go only to the authority of the common council to order the improvement, or to the authority of the board of public works to have the work performed; but as to the confirmation of the assessment, the right to interpose objections is unlimited, except that no merely formal irregularity or defect, or any error or omission which does not affect the substantial justice of the assessment, vitiates or affects it. Any proper objection going to show that the assessment ought not to be confirmed, as respects the objector's property, can properly be made upon the hearing of the application for judgment in the district court. An objection which goes no further than to claim that the judgment of the board of public works upon the matter of assessment differs from the judgment of some other person or persons, is an improper objection. The questions, what property is benefited by the improvement? and how much? are questions of opinion upon the facts as they appear. The charter has committed them to the board of public works, and their judgment is final and conclusive, and cannot be reviewed by the district court or any other tribunal, unless shown to be fraudulent in fact, or unless it is made up upon a demonstrable mistake of fact. Such fraud in fact, or demonstrable mistake of fact, are proper subjects of objection upon the application for judgment in the district court. *Certiorari* to the common council or board of public works will not lie for the purpose of attacking such assessment.

Certiorari to the board of public works of the city of St. Paul. The common council of the city of St. Paul having ordered the board of public works to cause a certain portion of Mackubin street in that city to be graded, the board, having made estimates for the improvement, and having let the contract in accordance with the law, gave the notice

required by the charter of the city (Sp. Laws 1874, p. 62, § 25,) of the time and place of their meeting for the purpose of making an assessment to pay for the same, and notified all persons interested to be present at such time and place, and that they would be heard. The relators appeared at this meeting and presented various plans for making the said assessment. The board completed the assessment, confining the same to all property on the line of a portion of Mackubin street, including the portion graded, and extending beyond in both directions, "assessing all alike, * * * except that the property in front of which gutters were constructed should be charged the additional cost of said gutters." Subsequently, and in accordance with the charter, (Sp. Laws 1874, p. 62, § 26,) the board gave public notice of a meeting to hear objections to the assessment as completed, and for confirmation of the same. At this meeting the relators appeared and objected to the assessment and its confirmation, because, as they alleged in substance, the said assessment was not made upon all the property benefited by the improvement, nor in just proportion according to the benefit, but that the same was made upon only a small proportion of the property benefited, without consideration of the form and position of the several portions of land assessed or the nature of the owner's interest therein, and that the same was "fraudulent and void, as said board, when it made the same, well knew." The relators offered to introduce evidence to prove the truth of their allegations; but the board refused to hear the same, and the assessment was confirmed as completed. Thereupon the relators made application for this writ.

McMillan & Beals, for relators.

This court has allowed this writ with an enlarged office. *Minn. Cent. Ry. v. McNamara*, 13 Minn. 508. It is the proper remedy in this case. *Le Roy v. Mayor*, 20 John. 430; *Baldwin v. Calkins*, 10 Wend. 169; *People v. Board of Police*, 39 N. Y. 506; *People v. Jefferson County Court*, 55 N. Y. 604;

Western R. R. Co. v. Nolan, 48 N. Y. 513; *People v. Williamson*, 13 Ill. 660. The right of appeal is taken away by statute, and, on application for judgment in the district court, no review of the errors complained of can be had. Sp. Laws 1874, p. 62, § 26, and p. 67, § 39 as amended by Sp. Laws 1875, p. 19, § 12. The board of public works, in making this assessment, acts judicially. Its confirmation is its judgment, and is subject to review by *certiorari*. *Starr v. Trustees of Rochester*, 6 Wend. 564; *City of Camden v. Mulford*, 26 N. J. Law, 57; *State v. Dowling*, 50 Mo. 134; *Parks v. Boston*, 8 Pick. 218.

W. P. Murray, for respondent.

A writ of *certiorari* should not be allowed at the instance of any individual. *Case of 51st Street*, 3 Abb. Pr. (N. Y.) 232; *Matter of 80th Street*, 17 Abb. Pr. (N. Y.) 324; *Libby v. Town of West St. Paul*, 14 Minn. 248. Great public detriment or inconvenience might result. *People v. Supervisors of Allegany*, 15 Wend. 198; *People v. Supervisors of Queens County*, 1 Hill, 195; *Mount Morris Square*, 2 Hill, 14; *People v. Mayor of New York*, 2 Hill, 9; *Ex parte Mayor of Albany*, 23 Wend. 277; *Carpenter v. City of St. Paul*, 23 Minn. 232; *Dousman v. City of St. Paul*, Id. 394. The board of public works were the sole judges; their action was final and conclusive upon all parties interested; Sp. Laws 1874, p. 62, § 26; and the assessment should only be set aside for fraud or mistake. *Rogers v. City of St. Paul*, 22 Minn. 494; *Wright v. City of Chicago*, 48 Ill. 285; *Jenks v. City of Chicago*, Id. 296; *Elliott v. City of Chicago*, Id. 293.

BERRY, J. With reference to assessments for grading streets, the charter of St. Paul (Sp. Laws 1874, c. 1, § 25, p. 62, as amended by Sp. Laws 1875, c. 1,) provides that, before proceeding to make an assessment, the board of public works shall give notice of the time and place of their meeting for the purpose of making the same, "in which notice they shall specify what such assessment is to be for, and the amount to be assessed," and that all per-

sons interested in any such assessment shall have the right to be present, and to be heard either in person or by counsel, and the board may, in their discretion, receive any legal evidence. Section 26 provides that when the board have completed the assessment, they shall give notice of a meeting to hear objections, and for the confirmation of the same, at which meeting all parties interested shall have the right to appear, and show cause why the assessment should not be confirmed; and the board are authorized, in their discretion, to revise and correct the assessment, and to confirm or set it aside. The city treasurer, to whom the warrant for the collection of the assessments is delivered, having given notice of his intended applications for judgment for delinquent assessments, and having made report to the district court, the court proceeds to the hearing of the applications, and the owner of any property reported delinquent, or any person interested therein, may appear and file objections in writing to the recovery of judgment against such property. "No objection," says section 39, as amended, "shall be interposed or sustained in relation to any of the proceedings prior to the confirmation of the assessment, except that the common council had no authority to order the said improvement, or that the board of public works had no authority to have the said work performed; and no objections as to any other of the proceedings shall be sustained on any mere formal irregularity or defect; and the city treasurer may amend, by leave of the court in its discretion, in any matter in furtherance of justice. The court shall hear and determine all objections in a summary manner, without pleadings, and shall dispose of the same with as little delay as possible, consistently with the demands of public justice; but should justice require that for any cause the suit as to one or more owners should be delayed, judgment shall then be rendered as to the other property and lands, and process shall issue for the sale thereof the same as in all other cases." Section 54, as amended, provides that "no error or omission which may have

heretofore been, or may hereafter be made, in the order or in the proceedings of the common council or board of public works, or of any of the officers of said city, in referring, reporting upon, ordering, or otherwise acting, concerning any local improvement provided for in this chapter, or in making any assessment therefor, or in levying or collecting such assessment, not affecting the substantial justice of the assessment itself, shall vitiate or in any way affect such assessment."

The charter provisions relating to such local improvements as the grading of streets show that, before any proceedings are had for making or confirming assessments, the questions of the propriety and necessity of the improvement, and whether there is property the benefits to which will equal the expense of making it, have already been passed upon and determined by the common council and board of public works. This determination includes, of course, a determination that an assessment is necessary and proper. The improvement having thereupon been ordered to be made, and the contract let, as by the charter provided, the questions next to be considered are, what parcels of property are benefited, and what is the benefit to each parcel proportionate to the expenses of the improvements? With reference to these questions two opportunities are afforded all interested parties to be heard before the board of public works. The theory of the charter appears to be that at the first hearing the board may properly hear suggestions, arguments, and, in their discretion, evidence, as to what area and what parcels of land are specially benefited by the improvement, and which should therefore be assessed, and as to the proportionate amounts to be assessed upon the different parcels benefited. After this hearing the assessment is completed, as the charter says,—that is to say, it is made out. Then follows a second hearing of objections to the assessment, and for its confirmation. At this hearing all parties interested are entitled to be heard upon the question of the propriety

and justice of the assessment as made out by the board. This is the first occasion on which such parties are enabled to criticise the assessment, because it is the first occasion on which they have been notified and permitted to meet it as it is actually made out. While the charter does not provide for the adduction of any *evidence* before the board at the second hearing, as it does at the first, still the whole question of the propriety, fairness, and justice of the assessment, as it is made out, is up and open for objection, though the question as to whether there is occasion for *an* assessment is not open—that, as we have before seen, having been previously settled. Now, when the report of the city treasurer comes into the district court, any person interested may appear and file objections to the recovery of judgment. Objections relating to proceedings *prior to the confirmation of the assessment* can go only to the authority of the common council to order the improvement, or to the authority of the board of public works to have the work performed; but as to the confirmation of the assessment, the right to interpose objections is unlimited, except that no merely formal irregularity or defect, or any error or omission which does not affect the substantial justice of the assessment, vitiates or in any way affects it. We can conceive of no proper objection going to show that the assessment ought not to have been confirmed, as respects the objector's property, which cannot properly be made upon the hearing of the application for judgment in the district court.

We use the phrase "proper objection" advisedly; for we are not to be understood as holding that *any* objection which a person interested sees fit to urge as a reason why the assessment should not have been confirmed, will be considered by the district court. It would be unwise in the extreme for us to undertake in advance to enumerate in detail all the objections which would or would not be proper objections. But we may go so far as to say that an objection that the assessment

was made with fraud in fact on the part of the board, as is claimed by the relators to have been the case in the proceedings which are sought to be brought before us at this time, would be a proper objection. But an objection which went no further than to claim that the judgment of the board of public works upon the matter of assessment differed from the judgment of some other person or persons, would certainly be an improper objection.

The questions, what property is benefited by the improvement? and how much? are questions of opinion upon the facts as they appear. They are therefore questions, the decision of which cannot be regulated by any *quasi* mathematical rules of law. They must be left to the judgment of men. The charter has committed them to the board of public works, and their judgment is final and conclusive, and cannot be reviewed by the district court or any other tribunal, unless shown to be fraudulent in fact, or unless it is made up upon a demonstrable mistake of fact. We say a demonstrable mistake of fact, meaning by this expression a mistake of fact as to the existence of which there is no room for doubt. An instance of such mistake would be this: Suppose that on each side of a street, graded under the charter provisions which we are considering, there were five blocks in every respect alike, except in location. The assessment of four on each side, leaving the middle block on each side unassessed, if it were not a case of fraud, would be an instance of demonstrable mistake of fact. The failure to assess the middle blocks could not be accounted for on any other basis. We will not pursue this subject further.

In the case at bar, the complaint of the relators is confined to the assessment. As before stated, we are of opinion that any objection which can properly be made to the assessment can be made upon the hearing of the application for judgment in the district court. If this is so, the exclusive remedy of the relators is upon such hearing in the district court, with

a right to review the action of the district court in this court. It follows that, for the purpose of attacking the assessment, a *certiorari* will not lie to the common council or board of public works.

The writ herein issued is accordingly quashed.

WILLIAM O'MULCAHY vs. A. M. FLORES.

February 21, 1881.

Taxes—Limitation of Actions.—The limitation in the tax law of 1878 does not apply to tax sales had under the law of 1875.

Tax Deed not "regular on its face."—A deed by a county auditor, made in 1865, recited "that whereas the treasurer of the county of Rice, in the state of Minnesota, did, on the 5th day of June, in the year 1862, at the auditor's office in the town of Faribault, in said county, in conformity with all the requisitions of the several acts in such cases made and provided, expose to public sale a certain tract of land, (describing it,) for the sum of six dollars, being the amount of taxes for the year 1861, and whereas, at the time and place aforesaid, said land was not sold for want of bidders, and was therefore declared and became forfeited to the state of Minnesota." It then recited the payment by the grantee in the deed, into the county treasury, of the costs and taxes on the land, and the issuance to him of a certificate thereon. The auditor made the deed as of lands forfeited to the state. *Held*, that the deed does not show the lands to have been forfeited, because it does not show authority in the county treasurer to make a sale for taxes, and the deed is not regular on its face.

Same—Color of Title.—One in possession of real estate under an instrument which, upon its face, does not appear to give him any title or right to possession, is not holding under color of title.

Plaintiff brought this action in the district court for Rice county, to recover possession of 160 acres of land in that county, for the rents and profits of the same, and for damages done by defendant to the said property. Defendant, answering, denies plaintiff's ownership, and sets up title under a tax deed from the state on a sale for taxes of 1861, and also under a sale of the premises in 1875 for the tax of 1874,

accompanied with peaceable possession since 1873; and, as a counterclaim, defendant sets up improvements made by him on the land in question since 1873, to the value of \$1,288.50, and payment of taxes, with interest, to the amount of \$1,040.74.

The case was tried before *Buckham, J.*, and a jury, who returned a general verdict that plaintiff was entitled to recover possession of the land in controversy, and a special verdict finding that defendant had been in possession of said land before the commencement of this action more than three years after the tax sale in 1875; with a finding also as to the value of the improvements, and the amount of taxes paid and damages done by defendant. The court thereupon ordered judgment for plaintiff that he recover possession of the land in controversy, "provided that execution for possession shall not issue unless, within one year from the rendition of said verdict, the plaintiff shall pay into court for the defendant the sum of \$1,109.83," the same being for improvements made and taxes paid by defendant. Judgment was entered accordingly, and both plaintiff and defendant appealed.

Geo. N. Baxter, for plaintiff.

Gordon E. Cole, for defendant.

GILFILLAN, C. J. As the record does not show any right in plaintiff to recover at all, either the possession of the land or for damages done to it, if defendant's claim that the right of action to avoid the sale in 1875 was barred before the action was commenced be well founded, we will consider that question first.

That sale was had under the statute of 1875. Section 30, chapter 5, General Laws of that year, provides: "No sale shall be set aside or held invalid unless the party objecting to the same shall bring his action to set aside such certificate, or to test the validity of such sale, within five years from the date of the sale." The act of March 11, 1878, (Gen. St. 1878, c. 11,) provides, (section 85:) "No sale shall

be set aside or held invalid, * * * unless the action in which the validity of the sale shall be called in question be brought, or the defence alleging its invalidity interposed, within three years after the date of the sale." The act of 1878 has no express repeal of the act of 1875 or any part of it. But defendant argues that, as the act of 1878 is a general revision of the former laws on the same subject, to wit, the assessment and collection of taxes, it operates, by implication, as a repeal of such former laws, including the section we have quoted from the act of 1875, and that the limitation in the act of 1878 takes the place, even as to past sales, of that in the act of 1875. If the later act operated as a repeal of the limitation in the earlier as to sales under the earlier—and we do not think it did—yet the limitation of the later act would not apply to past sales, but would leave actions to avoid those sales without any limitation except as provided in the general law limiting the time for bringing actions; for the act of 1878 does not purport to regulate nor relate to past transactions. Its whole import is to provide rules for future assessments, future proceedings to enforce taxes, future judgments, future sales, and future certificates of sale, and none other. It does not assume to legislate for the past. Past proceedings of the kind must stand or fall, and be controlled, by the law in force when they were had. The limitation must, in the absence of terms to show a contrary intent, be held to apply only to the sales or certificates thus provided for in the act which fixes the limitation. The plaintiff's action was, therefore, not barred by lapse of three years from the sale in 1875.

The tax deed of 1865, upon which defendant bases his other defence, recited that "whereas, the treasurer of the county of Rice, in the state of Minnesota, did, on the fifth day of June, in the year one thousand eight hundred and sixty-two, at the auditor's office in the town of Faribault, in said county, in conformity with all the requisitions of the several acts in such cases made and provided, expose to pub-

lic sale a certain tract of land, (describing it,) for the sum of six dollars, being the amount of taxes for the year one thousand eight hundred and sixty-one; and whereas, at the time and place aforesaid, said land was not sold for want of bidders, and was therefore declared and became forfeited to the state of Minnesota." It then alleges a purchase by defendant, by payment of the taxes and costs into the county treasury, upon which purchase, and the certificate issued thereon, the auditor makes the deed.

The purchase by defendant could be made only if the lands had been legally forfeited to the state. There is no recital, as there was in *Madland v. Benland*, 24 Minn. 372, of the composite or ultimate fact of forfeiture as an independent fact. The recital that "at the time and place aforesaid said land was not sold for want of bidders, and was *therefore* declared and became forfeited to the state," is based on the preceding facts, and derives whatever effect it has from them. It is only stating that *because* not sold when so exposed for sale by the treasurer the land became forfeited to the state. It is clear that the failure by the treasurer to sell for want of bidders could operate to forfeit the lands to the state only in case he had authority to sell. If his offer of them for sale was without authority, it could have no effect whatever as to the authority in the treasurer to sell. It was held in *Sheehy v. Hinds, ante*, p. 259, that a recital exactly similar to that in this deed showed no such authority.

As no authority appears for the treasurer to expose the lands for sale on the occasion when they remained unsold for want of bidders, it could not be that the land *therefore* became forfeited to the state. The deed was not regular upon its face. It could not, therefore, serve as a foundation for a claim under what is called the occupying-claimant law, (Gen. St. 1878, c. 75, § 15,) but it was not for that reason inadmissible. The statute attributes certain rights to the purchaser at a void tax sale, and although the deed was, by reason of the defects we have mentioned, irregular and ineffectual to

pass the title, it might be introduced to show defendant in position to claim these rights. Laws 1860, c. 1, § 99, provided that the purchaser at a sale for taxes should be taken as the assignee of the state, "and the amount of taxes, interest, and penalties charged on the said land at the time it was sold, together with all legal taxes afterwards paid thereon by such purchaser, his heirs, or assigns, shall operate as a lien on said lands, and may be enforced as any other lien; * * * and the same shall be required to be paid to the person or persons entitled thereto, before such person or persons shall be evicted or turned out of possession by any claimant recovering, by action, the land sold for taxes." This provision has been substantially retained in every revision or modification of the tax laws since 1860. There was no error, then, in admitting the deed in evidence, nor in admitting evidence of taxes paid by defendant.

But it was error to admit the evidence of improvements made by defendant, and also to allow him their value in the judgment. The value of them could not be allowed, by virtue of the provisions of the occupying-claimant law, under the tax deed, because it was not regular on its face, nor under the certificate of sale of 1875, which was regular on its face, because they were made before defendant had any right of possession under that certificate. Nor could they be allowed as a set-off against the damages for use of the land under Gen. St. 1878, c. 75, § 16, for that section allows them only in favor of one holding under color of title in good faith. One in possession solely under an instrument which upon its face does not appear to vest in him any title or right to possession—which is the case with this tax deed—cannot be said to hold under color of title.

It appears, also, to be error that the judgment makes no allowance to plaintiff for the damages for waste found by the jury.

Judgment reversed, and new trial ordered.

WILLIAM H. CAMPBELL *vs.* JOHN LANDBERG.

February 23, 1881.

Affirmance of an order of the district court granting a new trial, upon the ground that the verdict is not justified by the evidence.

Defendant, as sheriff of Stevens county, by virtue of certain writs of attachment issued in actions brought against James McGowan by his creditors, took possession of a stock of goods as the property of said McGowan. Thereupon plaintiff in this action, having made and served upon defendant an affidavit of ownership and a demand for the return of the goods, which was not complied with, commenced this action in the district court for the counties of Stevens, Big Stone and Traverse, to recover the value of the goods so taken. On the trial, before *Brown, J.*, and a jury, the title of plaintiff was shown by a purchase from McGowan, completed on January 10, 1879, about ten days before the defendant seized the goods, the only consideration for which purchase was plaintiff's note for an amount equal to the cost price of the goods less the freight, McGowan being at the time of the sale hopelessly insolvent. The jury brought in a verdict for plaintiff for the value of the stock as claimed in the complaint. Plaintiff appeals from the order of the district court granting defendant's motion for a new trial.

H. T. Bevins and Stocker & Matchan, for appellant.

Mead & Thompson and *C. L. Brown* for respondent.

BERRY, J. In the district court the defendant moved for a new trial upon several grounds; but, from the memorandum of the district judge, it appears that the motion was granted solely upon the ground that, upon the evidence in the case, McGowan's sale to the plaintiff was clearly fraudulent and void as respected McGowan's creditors, so that the verdict was not justified. After considerable hesitation we have, upon a careful examination of the testimony, come to

the conclusion that the order awarding a new trial should not be disturbed. The principles upon which this court proceeds in such cases are stated in *Hicks v. Stone*, 13 Minn. 434, which was followed and applied in *Barron v. Paulson*, 22 Minn. 36.

Order affirmed.

KNUD O. SOLLUND vs. A. E. JOHNSON.

February 26, 1881.

Evidence—Insolvency.—Evidence held sufficient to sustain the verdict in this case as respects a question of insolvency.

Fraud—Demand before Suit.—The plaintiff held a certificate of deposit for \$800, issued to him by a banking firm composed of defendant Johnson and one Johnsrud. The complaint alleges that, by the fraudulent contrivance of defendant, the plaintiff was induced to exchange the same for a certificate issued by Johnsrud alone, who was falsely and fraudulently represented by Johnson to be solvent and responsible, whereas, in fact, and to Johnson's knowledge, he was insolvent, irresponsible, and worthless, and ever since has been, and no part of the money has been paid, etc. Held, that if the jury found Johnsrud to be worthless and insolvent, and that Johnson had perpetrated the fraud charged, (as they might do upon the evidence,) a demand upon defendant or Johnsrud was not necessary to make out a cause of action in plaintiff against Johnson.

Appeal by defendant from an order of the district court for Freeborn county, refusing a new trial after a trial before Farmer, J., and a jury.

Tyrer & Whytock, for appellant.

O. Mosness and W. H. Merrick, for respondent.

BERRY, J. The plaintiff held a certificate of deposit for \$800, issued to him by a banking firm composed of defendant and one Johnsrud. The complaint alleges that, by the fraudulent contrivance of the defendant, the plaintiff was induced to exchange the same for a certificate issued by

Johnsrud alone, who was falsely and fraudulently represented by the defendant to be solvent and responsible, whereas, in truth, and to the defendant's knowledge, he was then insolvent, irresponsible and worthless, and ever since has been, and that no part of the money deposited has been paid to plaintiff, though requested, etc. The damages claimed are the amount of the deposit and of the unpaid interest thereon. For this amount plaintiff had a verdict, and from an order denying a new trial defendant appeals. Two points are made by appellant here: *First*, that there is no evidence, or no sufficient evidence, of Johnsrud's insolvency at the time of the alleged representation. Upon a careful perusal of the settled case we have come to the conclusion that, though the evidence is rather meagre, and not of the most satisfactory or convincing character, still there is evidence having a reasonable tendency to make out the insolvency, and therefore to support the verdict in that respect.

The second point is that no demand upon Johnsrud or the defendant was shown. If Johnsrud was worthless and insolvent, and the defendant had perpetrated the fraud charged, (and upon the evidence the jury might have found both of these conditions true,) then a demand upon either Johnson or Johnsrud was wholly unnecessary. If, as alleged in the complaint and shown by the evidence, the defendant had induced the plaintiff to exchange a certificate presumably good for a worthless certificate, the case was one of fraud and damage, and the cause of action complete.

Order affirmed.

LOUISA DYER vs. CITY OF ST. PAUL.

February 26, 1881.

27	457
40	390
27	457
52	16

Municipal Corporation—Damages to Private Property in Grading Streets.—An owner of land is entitled to the lateral support of the adjoining land in a public street, and a municipal corporation is liable for damage to such owner's land occasioned by removing such lateral support in grading the street.

Plaintiff brought this action in the district court for Ramsey county to recover for damages done to her lot by the defendant in grading a street on which it fronted. On the trial, before *Wilkin, J.*, and a jury, the plaintiff had a verdict; a new trial was refused, and the defendant appealed.

W. P. Murray, for appellant, cited, 2 Dillon Mun. Corp. § 987; *Callender v. Marsh*, 1 Pick. 418; *Snyder v. Rockport*, 6 Ind. 237; *Radcliff's Executors v. Mayor*, 4 N. Y. 195; *City of Lafayette v. Spencer*, 14 Ind. 399; *Macy v. City of Indianapolis*, 17 Ind. 267; *City of Delphi v. Evans*, 36 Ind. 90; *Korts v. City of Lafayette*, 23 Ind. 382; *Gurno v. City of St. Louis*, 12 Mo. 414; 51 Mo. 510; *Reynolds v. City of Shreveport*, 13 La. An. 426; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Rome v. Ormberg*, 28 Geo. 46; *Roll v. City Council of Augusta*, 34 Geo. 326; *Simmons v. City of Camden*, 26 Ark. 276; *Dorman v. City of Jacksonville*, 13 Fla. 538; *Ellis v. Iowa City*, 29 Ia. 229; *Russell v. City of Burlington*, 30 Ia. 262; *City of Burlington v. Gilbert*, 31 Ia. 356; *White v. Yazoo City*, 27 Miss. 357; *Alexander v. City of Milwaukee*, 16 Wis. 247; *Smith v. Corporation of Washington*, 20 How. 135; *City of Cincinnati v. Penny*, 21 Ohio St. 499.

S. L. Pierce, for respondent.

BERRY, J. The court below instructed the jury in this case that the plaintiff, whose lot adjoined a street, "was entitled to the lateral support of the land adjoining his lot, and that the city is liable for any damage occasioned by removing that lateral support in the grading" of such street. The instruc-

tion was based upon the decision of this court in *O'Brien v. City of St. Paul*, 25 Minn. 331. That case states, approves, and is determined upon the propositions that "in the control and improvement of streets for public use," a municipal corporation possesses "the same rights and power as a private owner has over his own land, subject to the same liabilities," and "that the corporation will be liable for damages caused to private property by grading streets, when a private owner of the soil over which the streets are laid would be liable if improving it for his own use." Upon further reflection, and an examination of authorities cited by the defendant, we see no occasion for receding from these propositions. As remarked in the *O'Brien Case*, we are still of opinion that the principle laid down "is the most sound, as it is most in accordance with justice, and with the protection to private rights against encroachment by the public, which the constitution aims to give." That a private owner of land has a right to the lateral support of the adjoining soil, and is entitled to damages for its removal, is an ancient and well-settled rule of law. Washburn on Easements, c. 4, § 1.

It follows that the instruction was correct, and the order denying a new trial is accordingly affirmed.

STATE OF MINNESOTA *ex rel.* Cyrus J. Thompson *vs.* J. A. REED and others.

March 7, 1881.

The warden and inspectors of the state prison, being empowered by Gen. St. 1878, c. 120, §§ 49, 50, to lease the prison shops and grounds, and to let to service the able-bodied convicts, for the highest and best attainable price, advertised for and received bids, on examination of which the bid made by relator was found to be the highest, but the

relator failed to receive a lease, by reason of the matters stated in the opinion. He thereupon obtained an alternative writ of *mandamus* from this court, to compel the execution of a lease in accordance with the terms of his bid. The warden and inspectors answered the writ, testimony was taken by a referee, and the cause heard upon the writ, answer and proofs.

•*Geo. L. & Chas. E. Otis*, for relator.

Chas. M. Start, Attorney General, *McCluer & Marsh*, and *W. P. Clough*, for respondents.

By the Court. Conceding what is claimed by the relator, that upon the acceptance by the warden and inspectors of his bid, he was legally entitled to the execution of a lease in accordance with the bid, still there might be terms and conditions, not inconsistent with the bid, which would be proper to insert, and which either party had a right to insist should be inserted, in the lease. Among those which the warden and inspectors might insist should be inserted were a condition against subletting, against removing the machinery and fixtures from the prison grounds, and for quarterly payments by the lessee. When the parties met, January 26th, to arrange the terms and execute the lease, the warden and inspectors, after concessions on both sides, arrived at the conditions upon these points which they would insist on, and they did insist on them. We think they had a right to have these conditions inserted. It appears that the relator unqualifiedly refused to execute a lease with such conditions. The parties separated on the 26th, and, as we think, with the understanding that his refusal was final, and that it terminated the transactions between them. The warden and inspectors always afterwards so treated it, as they had a right to do. This put an end to any rights of the relator under his bid. After it he was not entitled to a contract.

The peremptory writ is denied.

COUNTY OF HENNEPIN *vs.* BROTHERHOOD OF THE CHURCH OF
GETHSEMANE.

March 22, 1881.

27	460
51	441
27	460
52	147
27	460
82	134
27	460
j85	193

Hospital — Public Charity — Exemption from Taxation. — The defendant is owner of city lot 10, in Minneapolis, upon which is situated a building on which defendant has, for several years last past, maintained a hospital for the care of such as need the benefits of such an institution. This is known as the Cottage Hospital, and the public generally are entitled to enjoy its benefits, without regard to sex, race, or religious belief. Those who are cared for in the hospital, if pecuniarily able, are charged from two to six dollars per week, according to their ability. Such as are not able to pay are cared for without charge. Hennepin county is charged, for the care of such patients as are a legal county charge, six dollars per week. All income received from private and county patients is devoted to the maintenance of the hospital; and, besides, private contributions are necessary, and are bestowed, to maintain the same. City lots 8 and 9, which adjoin lot 10, and are in the same enclosure with it, are used as a vegetable garden, wood yard, etc., for the use and convenience of the hospital, no part of them being leased or otherwise used with a view to profit. *Held*, that the hospital is an institution of purely public charity, and that lots 8 and 9 are exempt from taxation as a part of the same.

Defendant, upon application being made to the district court for Hennepin county for judgment for taxes of 1878 against lots 8 and 9, described in the opinion, and of which it was the owner, appeared and filed its answer objecting to the same. The court, *Young, J.*, presiding, having made findings of fact and law, ordered judgment for defendant. Thereupon, on motion of plaintiff, the proceedings were certified to this court under Gen. St. 1878, c. 11, § 80.

W. E. Hale, for plaintiff.

George R. Robinson, for defendant.

BERRY, J. The facts found by the district court are these: The defendant is, and for several years last past has been, a corporation under the laws of this state, and, as such, owner of lots 8 and 9, in block 212, in Nelson's addition to Minne-

apolis. Defendant is also owner of lot 10, in the same block, upon which is situated a building in which defendant has, for several years last past, maintained a hospital for the care of such as need the benefits of such an institution. This is known as the Cottage Hospital, and the public generally are entitled to enjoy its benefits, without regard to sex, race, or religious belief. Those who are cared for in the hospital, if pecuniarily able, are charged from two to six dollars per week, according to their ability. Such as are not able to pay are cared for without charge. Hennepin county is charged, for the care of such patients as are a legal county charge, six dollars per week. All income received from private and county patients is devoted to the maintenance of the hospital; and, besides, private contributions are necessary, and are bestowed, to maintain the same. Lots 8 and 9, above mentioned, which adjoin lot 10, and are in the same enclosure with it, are used as a vegetable garden, wood-yard, etc., for the use and convenience of the hospital. No part of them is leased or otherwise used with a view to profit.

Upon these facts the district court held, as matter of law, that lots 8 and 9 were exempt from taxation. We think this was right. Section 3, art. 9, of the constitution, declares that "public burying-grounds, public school-houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, * * * shall, by general laws, be exempt from taxation." Gen. St. 1878, c. 11, § 5, provides that "all buildings belonging to institutions of purely public charity including public hospitals, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," shall be exempt from taxation. Whether the Cottage Hospital is a "public hospital," within the meaning of the constitution, and therefore a proper subject of exemption by statute, we do not deem it necessary at this time

to inquire. We have no doubt that it is an institution of purely public charity.

In legal parlance the word "charity" has a much wider signification than in common speech. But, without undertaking to give a general definition, it will be sufficient for all the purposes of this case to say that an institution established, maintained and operated for the purpose of taking care of the sick, without any profit, or view to profit, but at a loss which has to be made up by benevolent contribution, is a charity. If, in addition to this, the institution is one the benefits of which the public generally are entitled to enjoy, it is then a purely public charity—public, because, although not owned by the public, its uses and objects are public; purely public, because its uses and objects are wholly public, and for the benefit of the public generally, and in no sense private as being limited to particular individuals. The word "public" has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public. The Cottage Hospital falls within this description of an institution of purely public charity. That patients who are able to pay are charged for hospital services according to their ability, and that the county pays for such services rendered to those who are a legal county charge, are facts of no importance upon the question as to the character of the institution as one of purely public charity; for the fact still remains, that, notwithstanding all receipts from such sources, the hospital is established, maintained and conducted without profit or a view to profit, and that, on the whole, it is operated at a loss, which is necessarily made up by private contributions.

Lots 8 and 9 are not occupied by the hospital building; they might be disposed of, and the hospital still remain. But they are used, and used directly and solely, for the purposes of the hospital, as a wood-yard and vegetable garden. In our opinion they may properly be regarded as a part of the "institution." That term comprehends not only

a building, and the ground covered by it, but adjacent ground which is reasonably necessary or appropriate to the purposes and objects in view, and which is used directly for the promotion and accomplishment of the same. If these were leased, and were sought to be exempted because the rents were applied to the payment of the expenses of the institution, a question would be presented which we are not now called upon to answer. In our opinion these lots 8 and 9 are exempt from taxation, and they were therefore improperly assessed and taxed. The order of the district court directing judgment setting aside the tax assessed thereon is accordingly affirmed.

ELLING ISAACSON vs. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, impleaded, etc.

March 25, 1881.

Verdict for Items of Damage not pleaded.—Where, in an action in trespass, no objection is made on the trial, until after the proofs are closed, that items of damage, of which evidence is given, are not specifically alleged in the complaint, the court may disregard the defect in the complaint, and instruct the jury to find the damages according to the evidence.

Appeal by defendant, the Minneapolis & St. Louis Railway Company, from an order of the district court for Freeborn county, *Farmer, J.*, presiding, refusing a new trial.

John Whytock, for appellant.

Lovely & Morgan, for respondent.

GILFILLAN, C. J. Action for trespass upon plaintiff's land. The damage alleged in the complaint was the trampling upon and spoiling grain growing on the land. Plaintiff had a verdict, assessing his damage at \$161.50. The objections made here to the verdict are that it includes items of damage other than that specifically mentioned in the complaint

—to wit, to grain—and that the court erred in charging the jury that they might consider other items of damage proved. The court did so charge, and as each of defendant's requests refused by the court contained a proposition excluding such other items, the charge and refusal were correct, if it was proper for the jury to consider anything but damage to the grain.

The plaintiff proved apparently all the damages naturally resulting from the trespass complained of, including other items than damage to the grain alone. From time to time objections on various grounds were made to the evidence of damage, but in no instance was it objected that the evidence was not relevant to the allegations of the complaint. That objection was not made until the proofs were all closed, and the court came to the charge. The parties having until that time in the trial proceeded on the theory that the complaint was sufficient to admit the evidence, the court might then have ordered it amended to conform to the proofs, or it might do as it did, disregard the variance, and instruct the jury to find according to the evidence.

Order affirmed.

27	464
47	153
27	464
64	441

G. A. WHEATON and others *vs.* WILLIAM WHEELER and another.

March 28, 1881.

Extension of Time for Payment—Release of Sureties.—An agreement made between the creditor and principal debtor, without the consent of the sureties, to extend the time for payment of a debt for which sureties are bound, though made after the debt is due, discharges the sureties.

Appeal by plaintiffs from a judgment rendered by the district court for Hennepin county, after a trial by *Young, J.*, without a jury.

Woods & Babcock, for appellants.

Lochren, McNair & Gilfillan, for respondents.

GILFILLAN, C. J. Action against the sureties in a bond executed under Gen. St. 1878, c. 90, §§ 3, 4, relating to liens of mechanics and material-men. Plaintiff's claim was for materials furnished. The defences were—*First*, payment of the claim by the principal debtor; *second*, an extension of the time for payment, by agreement between the plaintiffs and the principal debtor without the consent of the sureties, whereby they were discharged.

The facts as found were: That on August 12, 1878, while plaintiffs were delivering the material, they drew upon the principal debtor, Montgomery, and he accepted, a bill of exchange for part of their claim, payable in 60 days. This was treated by the parties to it as a part-payment of the account, or at least as an extension of the time for paying the part of it represented by the bill, for, on September 24, 1878, they had a final settlement of the account, on which was found due \$275, on which settlement the amount of the bill was not included as a part of the account. On the settlement, Montgomery requested an extension of time for payment of the balance found due, and thereupon he executed, and plaintiff accepted, his promissory note for such balance, payable in 90 days. The sureties knew nothing of the bill and note. After the bill and note became due, plaintiffs sued Montgomery upon them, and recovered judgment against him for the amount of them.

The court below held that, without the consent of the sureties, the creditors and the principal debtor had extended the time for paying the debt to secure which the bond was given, and that the sureties were thereby discharged. If the debt was not actually paid by the bill and note, the time to pay it was certainly enlarged by those transactions. There is nothing to suggest that they were, as plaintiffs claim, given merely as collateral security to the original debt. They added nothing to the security. Their only effect was to

change the evidence of the debt, and make it payable, not on demand, as it was originally, but at fixed future days. It would be absurd to suppose the parties contemplated that, as soon as the bill and note were given, the creditors might demand and be entitled to receive the original debt, leaving the bill and note outstanding in the hands of the creditors, or of any one to whom they might endorse them. The fact that, at the time of the extension, the debt was already due, and a cause of action on the bond had accrued, did not vary the effect of the extension upon the obligation of the sureties. The extension operated on the debt. It was a waiver of the right to sue for it at that time. It disabled the creditors, during the time of the extension, to demand or sue for the debt, and the debtor to pay it. *Lyman v. Rasmussen, ante, p. 384.* This in law was such a prejudice to the rights of the sureties as discharged them.

Judgment affirmed.

27	466
40	214
27	466
45	311
27	466
63	152
27	466
69	112

EDWARD P. BARNUM *vs.* CHARLES A. GILMAN.

March 29, 1881.

Election — Disqualification of Candidate having Plurality of Votes.—A person who receives less than a plurality of the votes cast at a popular election for lieutenant governor is not entitled to the office, though the next highest candidate, who receives such plurality, is ineligible to the office—the fact of such ineligibility not appearing upon the ballots which he so received.

Same—Quo Warranto at Suit of Private Person.—A *quo warranto* will not be issued, without the consent of the attorney general, upon information of a private party having no personal interest in the question distinct from the public, to try the right of an incumbent of a public office to hold the same.

Petition for a writ of *quo warranto*. The facts appearing in the petition and answer are stated in the opinion.

H. F. Masterson and Seagrave Smith, for petitioner.

C. K. Davis, for respondent.

CORNELL, J. The question of granting leave to the relator, without the consent of the attorney general, to file an information for a *quo warranto* against the defendant, to inquire into and determine his right to the office of lieutenant governor, which he now holds, is presented upon the admissions and averments of his answer to the petition and order to show cause, taking them to be true. If, upon the showing thus made, the relator is not entitled to the office under any circumstances, he clearly has no interest in any question properly triable by means of the writ, and his application should be denied on that ground alone, irrespective of any other question or consideration.

At the state election in November, 1879, the relator and respondent were both candidates for the office of lieutenant governor, for the term commencing January 1, 1880, having been put in nomination and supported as such by their respective parties. The result of the official canvass, the correctness of which is admitted, showed that of all the votes cast for that office the respondent received a decided majority, and some 20,000 more than the relator, who was the next highest candidate. Thereupon the respondent was duly declared elected, and given a certificate of election, and he subsequently qualified as such officer.

At the time of his nomination he was holding the office of a representative in the legislature from the first representative district in the county of Stearns, under an election for a term extending to January 1, 1881; but prior to the said state election he resigned that office, and his resignation was duly accepted. In the convention that nominated him, the fact of his being a representative was made known, and the question of his eligibility to the office in view of it was discussed, with the result already stated. The discussion was continued during the subsequent canvass, in the newspapers and at various public meetings held in different parts of the

state, his eligibility being insisted upon by his friends and supporters, and denied by his opponents. Upon this state of facts, relator claims that the respondent was ineligible to the office, under article 4, section 9, of the constitution, which provides that "no senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States, or the state of Minnesota, except that of postmaster," and that the fact of his ineligibility was of such general notoriety as to be presumably within the knowledge of the whole body of electors, so that all votes cast for him must be treated as nullities, although not declared to be void by any express provision of law.

It may well be doubted whether the constitutional provision in question was intended as a restriction upon the choice of the electors in the selection of their official servants. Clauses of that character must receive a strict construction. They cannot be extended by implication. The constitution makes every qualified elector eligible to every office elective by the people, except as otherwise provided by some of its provisions, or by the constitution and laws of the United States. Article 7, § 7. In the case of justices of the supreme and district courts, special provision is made against their holding any other office under the United States or this state, and it also expressly provided that "all votes for either of them for any elective office under this constitution, except a judicial office, given by the legislature or the people, during their continuance in office, shall be void." Article 6, § 11. The clause under consideration contains no such declaratory enactment as to the effect of votes given to a senator or representative, while in office, for any other office. The prohibition is against holding any other office embraced within it, but it does not in terms go to the ineligibility of a person holding the office of senator or representative to an election to such other office. Ineligibility to hold an office, and ineligibility to an election to it, are not identical. One may be disqualified from holding an office at the time of his election

thereto, and yet be eligible to an election to it; and if, before he is required to enter upon its duties, the disability is removed, he may also take and hold it.

The plain purpose of the provision was to prevent persons holding official relations with any other department of government, state or federal, from influencing directly, by their presence and votes, legislative action in matters affecting such their relations, or their private or personal interests connected therewith. Hence the disqualification was attached *eo nomine* to a "senator or representative," which, of itself, clearly implies that it can only continue while the party affected by it remains a senator or representative. When he ceases to be such, whether by lapse of time, resignation, or otherwise, the disability terminates. The clause, "during the time for which he is elected," cannot properly be construed as enlarging the scope of the prohibition, so as to include persons not in fact members of the legislature. The expressed purpose of the provision was to prohibit senators and representatives from holding any other office than postmaster, and not to disqualify for a definite period of time persons who may become such, whether they remain in office or not. The clause may very properly be construed to mean "during his term of office," and this may be the full term during which the office may be held, or such shorter period as the incumbent may consent to hold it. The term of every elective office, in the absence of any express enactment of law to the contrary, may be terminated at the pleasure of the incumbent, by resignation, or by the acceptance of an incompatible office.

Conceding, however, the incorrectness of these views as to the construction of the constitutional provision in question, and that the respondent was in fact legally ineligible to the office of lieutenant governor, it is certain that his right to hold the office cannot be tested upon the information of the relator alone, without the consent of the attorney general, unless he shows himself entitled to the office by reason of

his having received the next highest number of votes to those cast for his ineligible competitor. The relator's right to the office depends upon the legal effect of the votes which the respondent received, assuming him to have been ineligible by reason of the alleged fact that his term of office as representative had not then expired, notwithstanding his resignation; the contention on the part of the relator being that they were absolute nullities, and therefore not to be counted or considered in determining the result of the election.

The authorities of both the English and American courts agree that the ineligibility of a candidate who has received the highest number of votes for an office will not, in the absence of any statute declaring them to be void, work the result of giving the election to the next highest candidate, when the voters for the former had no prior actual knowledge of the disqualifying fact, together with such other information as would raise a reasonable inference that they also knew that the fact amounted in law to a disqualification rendering the person voted for ineligible. *Queen v. Mayor, etc., of Tewkesbury*, Law Rep. 3 Q. B. 629, and cases cited *infra*.

In a well-considered case recently decided in New York, (*People v. Clute*, 50 N. Y. 451,) the rule which requires a vote to be treated as of no effect, in case the person receiving it is ineligible, is thus stated by the court, (page 466:) "The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a wilfulness in acting when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." The case arose under a public statute, which

prohibited the election to an office of superintendent of the poor, in a county, of any supervisor of a town or ward in a city in such county, and the points decided were that Clute, who was a supervisor of a ward in the city of Schenectady, was ineligible to an election to the office of superintendent of the poor, and therefore not entitled thereto, though receiving the highest number of votes therefor, but that the electors of such ward were not chargeable, upon any presumptions of law or fact, with any notice or knowledge of the fact that he was such supervisor, or of the existence or operative effect of the public statute which made that fact a disqualifying one, so as to nullify the votes which were given to him in that ward, and thereby give the office to his competitor, who, but for such votes, received the requisite number to entitle him to an election. If the case at bar is to be decided upon the doctrine of that case, clearly the relator has no right to the office of lieutenant governor, though Mr. Gilman may have no legal right to hold it.

In *Gulick v. New*, 14 Ind. 93, subsequently followed by the same court in *Carson v. McPhetridge*, 15 Ind. 327, and *Price v. Baker*, 41 Ind. 572, while conceding the rule to be that ineligibility from a cause unknown to the voters, such as infancy or want of naturalization, will only operate to defeat the election of the person affected by it, it was held, in case the ineligibility arises out of holding a public office which is made a cause of disqualification by some public law, that the electors within the territorial limits of the jurisdiction of such officer are chargeable with notice as to who is the incumbent of the office, and also that the statute disqualifies him from being elected to any other, so that any votes cast by them in his favor therefor will be treated as nullities. The doctrine of these cases is disapproved in that of *People v. Clute*, above cited, and is undoubtedly against the general current of judicial opinion and authority in this country, which upholds, as more in harmony with the spirit of our institutions, the rule that a majority of votes cast for

an ineligible candidate at a popular election, in the absence of any statute declaring them void, while conferring no right to the office, are still so far effectual as to prevent a minority candidate being elected. *Com. v. Cluley*, 56 Pa. St. 270; *Saunders v. Haynes*, 13 Cal. 145; *Crawford v. Dunbar*, 52 Cal. 36; *State v. Giles*, 1 Chandler, (Wis.), 112; (s. o. 2 Pinney, 166;) *State v. Smith*, 14 Wis. 497; *State v. Swearingen*, 12 Ga. 23; *People v. Molitor*, 23 Mich. 341; *State v. Gastinel*, 20 La. 114; *Fish v. Collens*, 21 La. 289; Opinion of Judges, 38 Me. 598; *Sublett v. Bedwell*, 47 Miss. 266; *In re Corliss*, 11 R. I. 638; Cooley on Const. Lim. 620; 1 Dillon, Mun. Corp. § 135.

In this state the question as yet is an open one, so that the point for adjudication upon the facts in the case at bar may and ought to be ruled upon reason and principle, having reference to our own laws and the policy they indicate. Our statute regulating elections (Gen. St. 1878, c. 1, § 48) enacts "that in all elections, unless it is otherwise expressly provided, the person having the highest number of votes for any office shall be deemed and declared to be elected." The plain purpose of this provision is to secure in places of public trust representatives of the popular will, chosen by a plurality of the qualified electors who may see fit to exercise the right of voting in the manner provided by law. Under it no one can be deemed the choice of the electoral body, or elected to any office, who has not received a plurality of the legal votes cast by that body. The statute prescribes the manner in which every elector shall exercise his right of voting, which shall be by a secret ballot, the form and character of which is prescribed. Gen. St. 1878, c. 1, § 14. It must be "a paper ticket containing, written or printed, or partly written and partly printed, the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen;" and every ballot having a greater number of names for any one office than the number of persons required to fill

the same, is declared to be void to that extent, but no further. Id. §§ 14 and 19.

For the purpose of determining the choice of the electors, no provision is made for any inquiry into their motives and intentions, or their means of knowledge concerning the qualifications of the persons voted for, other than what is furnished by the ballots themselves. That none such was intended to be allowed is evident from the nature and character of the secret ballot, which is guaranteed to every voter as an inviolable right by the constitution, for that precludes the possibility of identifying his vote, and prevents any effective investigation, outside the ballot itself, concerning the intention with which it was cast, or the knowledge which was had by the one who gave it. Every ballot, therefore, cast at any election, which substantially conforms to all the requirements of the statute, and which does not disclose upon its face any fact making it void, such as the ineligibility to an election of the person voted for, from which, possibly, a knowledge of that fact on the part of the voter might be inferred, and a presumption raised of an intention to waste his vote, must be taken as a valid and *bona-fide* expression of the voter's choice in favor of the person therein named for the office designated, and cannot be treated as a nullity. It cannot be presumed, in opposition to the declared purpose of the vote itself, that it was cast in bad faith, and with no intention to make it effectual, as might perhaps be the case with one voting with actual knowledge that the person voted for was in fact and in law ineligible to an election. To allow such a presumption to nullify more than half the votes given at a state election, as we are called upon to do in this case, would be doing violence to the fundamental principle of a popular government, which, in recognizing the fitness and capacity of the people for self-government, necessarily implies that the right of suffrage will be exercised in good faith, and in accordance with the best judgment and information of the electors.

Conceding, therefore, the respondent's ineligibility as claimed, it better accords with the policy of our election laws and the spirit of our political institutions to hold that those who voted for him acted from want of knowledge, or some misapprehension of law or fact affecting his eligibility, whereby the election has proved a failure, than to attribute to them such a wanton abuse of the elective franchise as would be implied in knowingly wasting their suffrages upon one disqualified from receiving them, and thereby give to the relator an election which is evidently not the result of the deliberate choice of the electoral body. As further bearing upon the question under consideration, it is to be noted that the framers of the constitution, in creating the disqualification mentioned in section 9 of article 4 of that instrument, made no provision for nullifying such votes as might be cast for a person resting under such disqualification; while in creating, in nearly identical language, a like disability in respect to justices of the supreme court and district judges, (article 6, § 11,) they expressly provided that "all votes for either of them for any elective office under this constitution, except a judicial office, given by the legislature or the people, during their continuance in office, shall be void." The implication is strong, if not conclusive, that the rule thus expressly adopted in the latter case was not intended to be applied in any case arising under the provisions of the former section.

It results from these views that the relator is in no position to question the legal right of respondent to hold the office of lieutenant governor, and his application must be denied.

GILFILLAN, C. J. I do not concur in what is said in the opinion of the majority of the court on the question of the respondent's eligibility to the office of lieutenant governor, and on the meaning of the constitutional provision referred to. I prefer to express no opinion thereon, as I do

not think it necessary to the decision of the case. I concur in the decision that the relator does not appear entitled to the office, and that therefore he cannot, without the consent of the attorney general, have the writ of *quo warranto* to test the respondent's right to the office.

HIRAM BERKEY vs. MARY ANN M. JUDD and others, Executors.

March 31, 1881.

27	475
30	20
30	216
27	475
54	452
27	475
61	594

Death of Party after Verdict against him—Enforcement of Judgment.—Under Gen. St. 1878, c. 66, § 274, where, after verdict or decision upon an issue of fact, and before judgment, the unsuccessful party dies, and judgment on the verdict or decision is afterwards entered without substituting the executor, neither the judgment, verdict, or decision, nor the claim involved in the action, need be presented to the commissioners appointed to audit claims against the estate of the deceased party. Upon a certified copy of such judgment being filed in the probate court, it is entitled to be paid with the other debts allowed against the estate. An action cannot be maintained on the judgment against the executor.

Appeals by defendants from an order of the district court for Washington county, *Crosby, J.*, presiding, on appeal from an order of the probate court of said county, and from an order of said district court overruling the demurrer of defendants to the complaint of plaintiff in an action therein pending.

The facts are stated in the opinion.

McCluer & Marsh and *Bigelow, Flandrau & Clark*, for appellants.

H. J. Horn and *L. R. Cornman*, for respondent.

GILFILLAN, C. J. In 1865, respondent Berkey commenced an action against George B. Judd and Orange Walker. The cause was referred to and tried by a referee, who, in April, 1871, filed his report directing judgment for the plaintiff and against the defendants for \$10,032.10. The defendants made

a motion for a new trial, which was denied. From the order denying it an appeal was taken to this court, where the order was affirmed. The cause was remanded to the district court, and judgment there entered upon the report January 7, 1876. After the report, and before the appeal, Judd died, leaving the appellants executors of his will. Commissioners to audit claims against the estate were duly appointed, who duly considered and adjusted all claims presented to them, and filed their report February, 1873, which was accepted. The claim here involved was not presented to them. The executors were not substituted as parties defendant in place of Judd. In January, 1876, a certified transcript of the judgment was filed in the probate court. Walker paid one-half of the judgment, and it was released as to him. There was sufficient property of the estate, after all other claims against it were paid, to pay this claim. In July, 1876, the respondent filed his petition, setting forth the foregoing facts, in the probate court, and asking an order that the executors pay the amount of the judgment remaining after the release as to Walker. That court denied the application, and this respondent took an appeal to the district court, where the decision of the probate court was, in effect, reversed, and the executors ordered to pay the claim. The executors appeal to this court. This respondent also commenced an action against the executors in the district court, the complaint setting forth the facts. To the complaint a demurrer was interposed, and overruled by the court below. From the order overruling it an appeal is brought to this court.

The claim of the respondent was not, under the statute, the proper subject of an action against the executors. The demurrer to the complaint against them ought, therefore, to have been sustained. The question on the other appeal is, ought the claim to have been presented to, and passed on by, the commissioners? If it ought, it is barred because not so presented. The case is that of an action pending at the death of the defendant. We find in the statute two pro-

visions in respect to such actions, (Gen. St. 1878, c. 53, § 16:) "All actions which are pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment; and the executor or administrator may be admitted to defend the same; and, if judgment is rendered against the executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate." This applies to the action in whatever stage, whether before or after trial, the defendant dies. It is evident that, so far as controlled by this section, the executor or administrator ought—except, perhaps, where nothing remains to be done in the action but the merely clerical act of entering the decision of the court already made—to be substituted in place of the deceased. But, if not done, the subsequent proceedings and judgment, although voidable, would not be void. *Stocking v. Hanson*, 22 Minn. 542.

Gen. St. 1878, c. 66, § 274, reads: "If a party dies after verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate." This means that the judgment may be entered in such case without making the executor or administrator a party. When entered, it fixes the liability of the estate to pay it "in the course of administration." To make it "payable," no other court need pass upon it. The whole jurisdiction to determine the liability is retained in the court which has the action. It is necessarily so, unless the death of the party is to operate to vacate the verdict or decision upon the issue of fact, or to take away the unsuccessful parties' right to complain of it. That verdict or decision could not be presented to the commissioners as a claim against the estate, for they could not determine whether it was erroneous or not—whether it ought to be set aside or to

stand; they could not review the trial. Nor can it be intended that the judgment so entered, in order to be payable out of the estate, must be presented to and passed on by the commissioners, for it may not be entered till long after they are discharged. It is clear to us that, in a case within section 274, a claim of which, at the time of the decease, another court has jurisdiction, may be passed on by that court, and need not be presented to the commissioners. That the section does not, like section 16 of chapter 53, provide for certifying the judgment to the probate court, is of little importance. When a judgment in another court, conclusive against the estate, has been rendered, there can be no difficulty in bringing it to the knowledge of the probate court, so that it may order it paid. Without any statute on the subject, a certified or authenticated copy of the judgment filed in the probate court is sufficient.

The order or judgment of the district court, directing the executors to pay the judgment, is affirmed. The order overruling the demurrer is reversed.

M. D. WELLS *vs.* WILLIAM GIESEKE and others.

April 1, 1881.

Judgment by Confession—Mode of Entry.—Under General Statutes 1878, c. 82, § 3—the chapter relating to judgments by confession—the indorsement of judgment on the statement filed, and the entry of judgment in the judgment book, is each an original. The omission of either, the other being made, does not render void a docketing of the judgment or an execution issued on it.

Same—Statement for—Facts necessary.—A statement for judgment by confession should state, not merely the evidence of the debt which the parties have made,—as the note, bond, or other writing,—but also the facts furnishing the consideration for such note or other writing, far enough to put creditors of the party confessing judgment on inquiry as to the existence of the facts, and direct them so that they can make such inquiry. Stating that the writing was upon a full and valuable consideration, without stating its character, is not enough.

37	478
40	250
40	261
40	262
37	478
45	361
27	478
73	116

Same—May be good for Part of the Liabilities Stated.—Where the statement is for two or more liabilities, if there be no actual intent to defraud, the judgment may be vacated as to those insufficiently stated, and allowed to stand as to the others.

Same—Amendment *Nunc pro tunc*.—The court cannot allow an amendment *nunc pro tunc* of an insufficient statement for judgment by confession, so as to affect the rights of creditors who have subsequently acquired liens, and who have begun proceedings to avoid the judgment.

Action by plaintiff, in the district court for Brown county, to have a judgment by confession, and a levy under execution thereon, in favor of defendant Gieseke against the defendant Albert Behnke and one Henry Behnke, as partners, set aside and declared void as against a subsequent attachment, judgment and levy under execution, in favor of plaintiff against said Albert Behnke, as surviving partner. The complaint alleged, and the facts as found by the court show, that the confession of judgment was filed with the clerk of the court, and endorsement of judgment made thereon by him, on February 4, 1879, and that execution issued thereon and was levied on the same day; but that the judgment was not entered in the judgment-book till February 6, 1879. Plaintiff's writ of attachment was issued and levied on February 5, 1879. Defendants answering presented to the court an amended statement for the confession of judgment, and asked for its allowance *nunc pro tunc*. The cause was tried by the court, Cox, J., presiding, and judgment was entered for defendants, dismissing the complaint, and allowing the amendment to the statement for confession of judgment; from which judgment plaintiff appeals.

S. L. Pierce, J. Newhart and B. F. Webber, for appellant.

The entry in the judgment-book is necessary to complete a judgment by confession. Gen. St. 1878, c. 82, §§ 1-3; c. 66, § 273. *Brown v. Hathaway*, 10 Minn. 238, (303;) *Williams v. McGrade*, 13 Minn. 46; *Jorgensen v. Griffin*, 14 Minn. 464; *King v. French*, 2 Sawyer, 441; *Ling v. King*, 91 Ill. 571. The law regulating judgment by confession must be

strictly followed. *Freeman on Judgments*, § 543 and note; *Smith on Construction of Statutes*, § 547; *Smith v. Moffat*, 1 Barb. 65; *King v. Hicks*, 32 Md. 460; *O'Brien v. O'Brien*, 42 Mich. 15.

Gordon E. Cole, for respondents.

Under the later New York decisions the original statement for judgment was sufficient. *Freligh v. Brink*, 22 N. Y. 418; *Cook v. Whipple*, 55 N. Y. 150; *Harrison v. Gibbons*, 71 N. Y. 58; *Lanning v. Carpenter*, 20 N. Y. 447; *Cleveland Co-operative Stove Co. v. Douglas*, ante, p. 177. It was sufficient, as to the third count at least, and the judgment would be upheld in part. *Kern v. Chalfant*, 7 Minn. 393, (487;) *Frost v. Koon*, 30 N. Y. 428; *Harrison v. Gibbons*, 71 N. Y. 58. But the amendment makes it all good, and should be allowed. *Chappel v. Chappel*, 12 N. Y. 215; *Mitchell v. Van Buren*, 27 N. Y. 300; *Union Bank v. Bush*, 36 N. Y. 631; *Cook v. Whipple*, 55 N. Y. 150.

GILFILLAN, C. J. On February 4, 1879, Henry and Albert Behnke were partners at New Ulm. On that day they made, signed and verified a statement for confession of judgment in favor of the defendant Gieseke for the amount of \$8,-101.88. The statement specified three items of indebtedness, two of them being promissory notes of the Behnkes to Gieseke, each of which notes is fully described, and is stated to have been for a full and valuable consideration, the nature and description of which, however, is not stated. The third item is that the Behnkes and Gieseke—he as surety only—executed to one Ross a promissory note, which is fully described, and, the Behnkes being unable to pay it, he, as such surety, paid it. This statement was on said day filed in the office of the clerk of the district court, who then endorsed on it a judgment, and entered it in the docket of judgments, but, owing to other business, did not enter the judgment in the judgment-book until February 6th, on which day he entered it. On February 4th, immediately after filing the statement

and endorsing the judgment on it, the clerk, at Gieseke's request, issued execution on it, and it was delivered to the sheriff, who, on the same day, levied it on the personal property of the Behnkes. On February 5th, this plaintiff commenced an action in the district court against Albert Behnke, as surviving partner, Henry Behnke having died on the morning of that day, and in said action, on said day, procured to be issued an attachment against the property of the defendant, and on the same day it was levied on the same property previously levied on under the execution in favor of Gieseke. Afterwards judgment was rendered in said action in favor of plaintiff, and execution thereon issued, and levied on the property previously attached; whereupon this action was brought to have the judgment by confession, and the execution thereon, set aside and declared void, and to restrain the sheriff from applying any proceeds of the property levied on upon such execution and judgment.

The statute regulating confession of judgment (Gen. St. 1878, c. 82,) provides, (section 3,) that the clerk, when the statement is filed, "shall endorse upon it, and enter in a judgment-book, a judgment of the district court for the amount computed. The statement and verification, with the judgment endorsed thereon, become the judgment-roll." From this it appears that each entry—that indorsed on the statement and that entered in the book—is an original. Neither of them can be called a copy. Either of them being made, that entered in the book sufficiently identifying the statement, it is the judgment of the court. To be strictly regular, both should be made. But the omission of either, the other being made, will not avoid the judgment, nor will the docketing or an execution issued be void by reason of the irregularity. The omitted entry may be ordered to be made *nunc pro tunc*.

The statement as to the item of indebtedness for money paid by Gieseke as surety for the Behnkes in satisfaction of the note to Ross is sufficient, for it shows not only a debt

justly due, but also the precise transaction out of which it arose. It is not so with the other two items—those upon the two notes of the Behnkes to Gieseke. The statute (Gen. St. 1878, c. 82, § 2,) requires that the statement “shall state concisely the facts out of which it (the indebtedness) arose, and show that the sum confessed therefor is justly due or to become due.” How precise and particular this statement should be has been matter of much discussion, especially in New York, where the decisions have not been entirely uniform. But all the cases, not only in that state but wherever a similar statute exists, hold that the purpose of the statute in requiring the statement of facts out of which the indebtedness arose is to protect creditors, and to prevent fraud by facilitating its detection, by enabling creditors to investigate the transaction out of which the debt might be alleged to have arisen. It is apparent that, in view of this purpose, a distinction must be taken between the transaction—the facts out of which the debt arose—and the mere evidence of it which the parties to the confession have made. If only that evidence be stated, creditors will be no better directed in their inquiries than by the judgment confessed. It is therefore uniformly agreed that stating such evidence as the note, bond, or other writing will not answer the purpose of the statute, and that the facts which furnished the consideration for the note, bond, or other writing must be stated far enough to put creditors on inquiry as to the existence of such facts, and to direct them so that they can make such inquiry. The statement in this case, so far as relates to the two promissory notes of the Behnkes, falls short of this requirement. Stating only that the notes were given for a full and valuable consideration, without stating its nature or the facts constituting it, or any fact directing inquiry as to its character and actual existence, is not enough.

There being no actual fraud in the confession, the judgment may be held good as to the item which is sufficiently

set forth in the statement, and bad as to the remainder. *Kern v. Chalfant*, 7 Minn. 393, (487.)

Notwithstanding the defect in the statement as to part of the debt, the whole judgment was good as between the parties to the confession. But as to that part based on the items defectively stated, it is void, or rather voidable, as against subsequent creditors who have acquired liens on the property of the debtor in the judgment by confession, and who take the proper proceedings to avoid it. The question arises, can the defective statement be amended *nunc pro tunc*, so as to make the judgment good against subsequent lien creditors who have begun proper proceedings to avoid it?

In *Mitchell v. Van Buren*, 27 N. Y. 300, in which the creditor was proceeding by motion, it was held that such amendment may be allowed. In two or three other cases in New York, it is intimated that it may be done when the creditor has commenced an action to avoid the judgment. The power of the court to allow the amendment *nunc pro tunc* is rested on the power given the court to amend by correcting mistakes and omissions, and to relieve against defaults and slips in practice. The portion of our statute equivalent to that in the New York Code on the subject of amendments is Gen. St. 1878, c. 66, §§ 120 to 125, inclusive. The only part of this statute which seems to apply to any but hostile actions or proceedings is part of section 125, which provides that the court "may supply any omission in any proceeding; and whenever any proceeding taken by a party fails to conform to the statute, the court may permit an amendment to such proceeding, so as to make it conformable thereto." This is sufficiently ample so far as the parties to any proceedings may be concerned. The power thus given enables the court to allow, as between the parties, any correction of mistakes or omissions which justice may require. But we do not think it was intended that the power should be exercised to the prejudice of rights accrued mean-

time in strangers to the proceeding. For instance, a case might occur where the plaintiff in an action or proceeding would, through accident, mistake or inadvertence, be prevented from obtaining, so early as he might desire, an entry and docketing of his judgment. And if justice between the parties required it, no doubt the court might date back such entry and docketing. But we think no one would contend that it might be done so as to affect the rights of another creditor of the same defendant, who by due proceedings had first procured his judgment to be docketed. Such a case would not be essentially different from this. Here, through the mistake or omission of Gieseke, and plaintiff's diligence, the latter has obtained a lien, which he has a right, upon his taking proper proceedings to that end, to have preferred to the lien of Gieseke, so far as it stands on that part of the judgment by confession which is voidable. The power of the court to amend cannot reach this right.

The plaintiff was entitled to have that part of the judgment by confession based on the statement of the two notes of the Behnkes to Gieseke, and the execution and levy to that extent, declared void as against the lien acquired by the levy of his attachment and execution. The judgment should be sustained for the amount of the money paid by Gieseke to Ross, to wit, the \$500, and the execution and levy sustained to that amount, as a lien prior to that of the plaintiff, and postponed to plaintiff's lien as to the remainder.

Judgment appealed from reversed, and the court below will enter judgment according to the views herein expressed.

SANFORD A. HOOPER vs. JAMES D. WEBB and others.

April 4, 1881.

Contract—Specifications—Evidence.—A contract for building a bridge referred to specifications to be attached to and become a part of it. *Held*, that there being some evidence to identify as the specifications intended some which, after the execution of the contract, were attached to it by one of the parties, it was proper for the court to admit them in evidence.

Same—Question of Construction erroneously submitted to Jury.—Where, in a contract, the terms “first party” and “second party” are used to indicate the parties, it is for the court to determine to which party each of the terms refers. If, instead of determining it, the court submits it to the jury to decide, and they decide it as the court ought to have done, the error is immaterial.

Same—Right of Contractor to abandon—Estimates—Waiver.—Where a party executes a contract to do work according to a certain plan, he cannot abandon the contract merely because the plan is an improper one. Where an act of the legislature appointed five commissioners to make a contract for certain work, and only three sign the contract, the contractor cannot abandon the contract on the ground that the other commissioners claim the contract to be invalid because they did not sign it. A contract provided that on the first of each month a designated engineer should make an estimate of the work done, and that thereupon the amount of the estimate should be paid to the contractor, either in the bonds of a certain borough or in currency. A small amount of work was done in June. No estimate was made on the first of July. An estimate was made August 1st, and all but a small amount of it paid August 5th. No demand for an estimate or payment was made, and no complaint of the omission or delay made till the contractor alleged it as a reason for abandoning the contract. *Held*, the jury might find that the contractor had waived any right to complain of the omission or delay.

Plaintiff brought this action in the district court for Scott county, to recover possession of personal property consisting of lumber and stone, alleged to have been wrongfully taken from him by defendants.

The answer sets up a contract made by the plaintiff with the defendant commissioners, the material parts of which are given in the opinion, full performance on the part of defendants, abandonment by plaintiff, and consequent forfeiture,

under the terms of the contract, of all plaintiff's claim or title to the property described in the complaint.

On the trial before *Macdonald, J.*, and a jury, the defendants had a verdict. A motion for a new trial being refused, plaintiff appealed. Plaintiff also appeals from an order striking out an exception inserted in the settled case.

L. M. Brown, for appellant.

R. A. Irwin, for respondents.

GILFILLAN, C. J. Action to recover possession of certain personal property, consisting of lumber and stone prepared for the construction of a bridge over the Minnesota river at Belle Plaine.

It appears from the evidence that under two acts of the legislature, passed in 1879, providing for the construction of the bridge, the commissioners appointed for the purpose, of whom there were five, proceeded to make a contract with plaintiff to furnish the material for and construct the substructure of the bridge. The contract was in writing, and was signed by plaintiff and three of the commissioners—the other two refusing to sign it. It refers to designs, plans and specifications for the work, prepared by the engineer who was to have charge of the work, to which plans, etc., the contract, when executed, was, as stated in the contract, to be attached and form a part of it, and thereupon to be deposited in the custody of the clerk of the commission. It provided for paying plaintiff for constructing the substructure the sum of \$8,875, "in manner following; that is to say, an estimate of the amount of work and the value thereof, proportionate to the whole, is to be made by said engineer on the first day of each month from and after the commencement of the work, and during the progress thereof, and until the completion thereof," and upon said estimate the said commissioners were to pay the amount thereof, either in the bonds of the borough of Belle Plaine, or in current money. Among the specifications which were attached to the contract when it was offered in evidence, was one which, in terms, provided

"that if the said first party shall, in the opinion of the second party, have failed or refused to comply with any of the stipulations contained in this contract to be performed by said first party, the second party shall have the right to cancel this contract and declare the same void; in which case the said first party shall have no claim whatever on said second party for damages or compensation for material or work; but said second party shall have a right to take possession of and hold said work and material absolutely, and shall be absolved as entirely and completely from this contract as if the same had never been made."

Under the contract, plaintiff commenced work on the bridge substructure sometime in June, 1879, and continued to about August 5th. No estimate was made by the engineer on July 1st, and, so far as the evidence shows, very little had been done up to that time. August 1st, an estimate, which included the property in controversy, was made, amounting to \$1,507.43. August 5th, the commissioners delivered to plaintiff \$1,500 in the bonds of the borough of Belle Plaine, and he thereupon served on them a notice of his intention not to do anything further towards fulfilling his contract, and also another notice specifying the grounds on which he refused to proceed. None of these grounds appear from the evidence to have been well founded, and some of them were, under the circumstances, frivolous; the whole being suggestive of a desire to escape from the obligations of his contract, rather than an honest intention to lay before the commissioners any complaint of their acts that he might have supposed he had. Afterwards, a corrected or final estimate was made of the work and material, amounting to \$1,523.78. The commissioners paid him the balance of \$23.78. The plaintiff continuing his refusal to go on with the work, the commissioners declared his contract forfeited, took possession of the material included in the final estimate, let the contract to finish the work to defendants Farrell & Smith, and turned the material over to them.

One of the defences relied on rested upon the specification which we have quoted, and a controverted question on the trial was, was that one of the specifications referred to in the contract as intended to be attached to and be a part of it? The case, on this point, is not entirely free from doubt, the evidence being conflicting; but the jury must be supposed to have found that it was one of those specifications, and their finding, as the evidence stands, must be held conclusive. At the time the contract, with the specifications attached, was offered in evidence, the evidence was to the effect that this specification was one of those referred to, and therefore the objection to the introduction of the specification, with the contract to which it was attached, was properly overruled. So that, if there were any exception to the ruling, it would not affect the case. But the court below struck from the statement of the case the exception inserted by appellant's attorney, and, on the proofs made for that purpose, it was justified in so doing.

What was meant in the specification by the terms "first party" and "second party" was a question of law for the court to decide. No serious question could be made, taking them with their context, that "first party" meant plaintiff, and "second party" the commissioners. And though the court ought not to have left it to the jury to decide, yet, as their decision of it was clearly such as the court ought to have made, no harm resulted from leaving it to them.

The questions put by plaintiff to the witness Webb as a cross-examination, and excluded on defendants' objection, were not properly cross-examination, but related to new matter. Evidence offered by plaintiff that the plan of the centre or turn-table pier was improper, and that two of the commissioners, who did not sign the contract, claimed that for that reason it was invalid, was clearly inadmissible. The execution of the contract by three of the five commissioners was a valid execution on the part of the commissioners; and the claim is absurd that he could abandon the contract because

the two not signing insisted that to render it valid required the signatures of all. It was plaintiff's business to ascertain before executing the contract that it could be fulfilled according to the plans.

Of the exceptions taken to the charge of the court, the only part intelligible is to the propositions that there was evidence from which the jury might find that plaintiff had waived any default of the commissioners in regard to estimates and payments, and also from which they might find that the payment of \$23.78 was in full, instead of only on account. It seems to have been claimed at the trial that the evidence showed that the commissioners were in default in not causing an estimate to be made of the small amount which had been done prior to July 1st, and in the delay of five days in paying the estimate for July.

Under the contract plaintiff had a right to insist on an estimate July 1st and another August 1st, and payment of each, either in bonds or currency, within a reasonable time thereafter. A refusal by the commissioners to comply with the contract on their part would have justified him in abandoning it. But he made no demand for an estimate on July 1st, and continued on with the work, saying nothing about the estimate. This was certainly evidence that he waived that estimate. He made no demand for an estimate on August 1st, nor for the payment of it. He made no complaint of any omission or any delay until he assumed to abandon the contract. The contract contemplated that after an estimate the commissioners should have time and opportunity to procure the issuance of bonds to pay it. They were entitled to a reasonable time to do this. There is no evidence, nor is it suggested, that the time taken from the 1st to the 5th was unreasonable. As to that estimate no default on their part appears. So far as there was any default to be waived, the court below was right in assuming there was evidence of a waiver. There was also evidence that the \$23.78 was paid and received in full for all plaintiff had done and furnished

under the contract. The amount was offered to be paid him as the balance due him on the estimate, (the final estimate.) At first he refused to receive it, but afterwards expressed his willingness to do so, and it was thereupon paid to him, and he gave a receipt for it, not as a balance due, but "on account." A receipt is explainable by parol; and, notwithstanding the language of this, the jury might find, from what had preceded, that the money was paid in full.

There is no question of forfeiture in the case. The plaintiff furnished the material under his contract, was paid for it pursuant to his contract, and according to his contract, he having without just cause refused to proceed with it, the right to the material and to retain it vested in the commissioners.

Orders affirmed.

WILLIAM S. HOYT and others vs. W. W. BRADEN and others.

April 12, 1881.

Town bonds in aid of Railroad—Condition precedent.—The doctrine of *Coe v. Caledonia & Mississippi Ry. Co.*, ante, p. 197, followed, and applied to the facts of this case. In voting town bonds under Sp. Laws 1875, c. 132, in aid of a railroad, it is competent for the town to stipulate, as a condition precedent to issuing the bonds, that the same shall be made payable at a place designated, and on or before the expiration of 20 years, at the option of the town. Such a condition is not repugnant to a clause in the statute providing that the bonds "shall be payable in not less than ten nor more than twenty years."

Plaintiffs, as resident freeholders and tax-payers of the town of Canton in Fillmore county, brought this action in the district court for that county, to restrain the town and the defendant Braden from delivering, and the defendant, The Caledonia, Mississippi & Western Railroad Company, from receiving, certain bonds voted and executed by the town in

aid of the railroad, and placed in the hands of said Braden for delivery, and praying for a temporary writ of injunction. On filing the complaint, the temporary writ was granted by Page, J.

The complaint showed that on June 13, 1879, under Sp. Laws 1875, c. 132, a petition signed by more than ten of the freeholders of the town, accompanied with a proposition from the railroad company, was presented to the proper officers, asking that a special meeting of the town be called for the purpose of voting aid to the railroad; that all proceedings were taken as required by law, and that at a special meeting of the town, held June 28, 1879, the proposition was defeated by a vote of the meeting; that subsequently, and on July 15, 1879, another petition and proposition were presented to the proper officers, asking for the issue of bonds in aid of the railroad to the amount of \$12,000, such bonds to be payable on or before twenty years from date, and to be issued and delivered to defendant Braden, who should deliver the same to the railroad company, upon its completing and having in operation its road into, and erecting a depot in the town "near the centre section line running north and south through said town, on either section twenty-one or twenty-two," on or before December 1, 1879; that thereupon all proceedings required by law were had, and on July 26, 1879, at a special meeting of the town the proposition was accepted by a majority vote of the meeting, and that the bonds so authorized have been issued and placed in the hands of defendant Braden, who threatens to deliver them to the defendant railroad company. The complaint further alleges that there was no legal authority or right to issue the bonds, and that they are illegal and unauthorized.

The defendants answered, and moved that the injunction be dissolved, which motion was granted by *Farmer, J.*, for the reason that the facts set forth in the complaint were not sufficient in law to justify the same. Plaintiffs appeal from the order dissolving the injunction.

H. G. Day and Wilson & Gale, for appellants, made the same points and cited the same cases as in *Coe v. Caledonia & Mississippi Ry. Co.*, *ante*, p. 197.

The proceedings were irregular in that they permitted the petitioners and the railroad company to make all the rules and regulations concerning the bonds. This power belonged to the supervisors. Sp. Laws 1875, c. 132, § 5. See *People v. Spencer*, 55 N. Y. 1.

It was error to dissolve the injunction after an answer which did not deny the equities of the bill, and before the trial. Hilliard on Injunctions, (3d Ed.) pp. 118, 119, 123, 125 and cases cited; High on Injunctions, §§ 899 and 902 and cases cited; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Purnell v. Daniel*, 8 Ired. (N. C.) Eq. 9; *Attorney General v. Oakland County Bank*, Walk. (Mich.) 90.

H. R. Wells and Griffith & Knight, for respondents.

CORNELL, J. The previous refusal of the legal voters of the town of Canton to give their consent to a similar proposition for extending aid to the defendant railroad company in the construction of its road, did not exhaust the power which was conferred upon the town by the provisions of Sp. Laws 1875, c. 132, and thereby make invalid the second election, which resulted in favor of issuing the bonds in controversy. *Coe v. Caledonia & Mississippi Ry. Co.*, *ante*, p. 197.

The point that the special election in this case was called without authority, and void, because of the stipulation which was embodied in the proposition that was submitted to the electors and was voted upon by them, that required the location of a depot at a particular place in the town as a condition to granting the aid asked for, was also presented in that case, and authoritatively decided against the position taken by the respondent in the case at bar. In discussing the effect of this special statute (chapter 132, *supra*) upon the authority of the towns and villages embraced within its provisions to vote bonds in aid of a designated railway, either with or

without conditions of any kind, the court say, (page 203:) "Inasmuch as and because the act of 1875 does not prohibit conditions, it is entirely competent for the legal voters of the [town] to impose such conditions upon an issue of bonds voted by them under such act as they may deem best; provided, of course, that they are not in violation of some express provision of the act mentioned, or some other statute, and are not prohibited by any general rule of public policy."

This view of the statute, which recognizes the legal right of any town acting under it to annex to any grant of aid it may make in aid of any railroad enterprise any condition deemed beneficial to itself which is not repugnant to the statute or any rule of public policy, is also decisive of the point which is here made, that the option of paying the bonds voted to be issued, before their maturity, upon 30 days' notice, that was reserved to the town in the proposition for aid which was mentioned in the petition and notice of election, and which was voted upon, was unauthorized, and hence that all the proceedings that were had under such petition were void.

The law which conferred upon the town of Canton, as one of the towns of Fillmore county, authority to issue the bonds in question, provides, in terms, that they shall be payable in not less than ten nor more than twenty years from the date of their issue. It may be conceded that this was a limitation upon the power to issue bonds which was conferred upon the town, restraining it from levying any tax for paying the bonds, or entering into any contract obligating it to pay any portion of them, before the end of ten years from the date of their issue, and that any contract of that character on the part of the town would be in direct contravention of the statute and void. Reserving the privilege, however, of paying its bonds at any time before their maturity, and of inserting a clause to that effect in the bonds it might issue, created no obligation whatever against the town, and imposed no duty.

upon it in respect to them. It did not even assume that the town would be able, under the authority conferred upon it by the statute or otherwise, to exercise the option thus reserved within the period of ten years, or that it intended to exercise it in the absence of any competent legislative authority. Its only legal effect was to bind the railway company, and whoever might become the lawful holders of the bonds, to accept payment whenever the town might be in a situation, in the exercise of a lawful authority, to levy a tax and make the payment, and should see fit thereupon to avail itself of the benefits of its option to pay its bonds before maturity. The stipulation in this regard, which is objected to by defendants, is not deemed repugnant to any provision of the special statute in question, nor contrary to any general rule of public policy, and the point taken upon it is overruled.

In answer to the contention that because the proposition for aid which was submitted to the electors, and was voted upon by them, prescribed the manner of the delivery, and the place and manner of the payment of the bonds voted for, the proceedings thereon were therefore void, inasmuch as that was a matter for the determination of the supervisors, under the act, after the issue of the bonds was voted for, and which they could not delegate, it is sufficient to observe that they fully exercised the authority which was vested in them in that regard, in the resolutions which were passed at the meeting of the board of supervisors held on the eighth of August next after the special election, whereby the specific stipulations which were embodied in the proposition that had been previously acted upon and approved by the legal voters of the town concerning the issue and delivery of the bonds, and their place of payment, were adopted as their own; and such previous approval by the voters did not vitiate their action or decision in the premises, or render it any the less effective as an act of their own. *Warsop v. City of Hastings*, 22 Minn. 442.

.

Inasmuch as the complaint itself disclosed no equities whatever, entitling the plaintiff to the relief sought, the preliminary injunction ought not to have been granted, and the subsequent order for its dissolution, which is the subject of the appeal herein, is affirmed.

MINNEAPOLIS HARVESTER WORKS vs. MATHIAS HALLY.

April 13, 1881.

Note given for Purchase-money on Conditional Sale—Retaking of Goods by Vendor—Failure of Consideration.—This action is brought upon the following instrument:

"\$240.

BELLE PLAINE, MINN., October 5, 1878.

"On or before the first day of September, 1879, for value received in two M. L. reapers, I promise to pay, to the order of the Minneapolis Harvester Works, \$240, at the office of Minneapolis Harvester Works, in Minneapolis, Minn., with interest at the rate of 12 per cent. per annum from date until paid; agreed, that if paid at maturity, (or in thirty days thereafter,) then the interest shall be nothing.

"And I further agree, in consideration of the credit herein given, that if this note is not paid when due, and suit is brought thereon, I will pay five dollars additional on the amount then due for attorney's fees, and the same may be included in the judgment. And I further agree to pay all other reasonable expenses incurred in collecting this note.

"The express condition of the sale and purchase of the machine for which this note is given is such that the title, ownership, or right of possession does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full. And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, even before the maturity thereof; and may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides. This note may be paid in good farmers' notes, taken and indorsed according to contract.

M. HALLY.

"P. O., Belle Plaine, County of Scott, State of Minn.

"Witness: P. B. NETTLETON."

27	495
43	409
27	495
74	116
74	117

27	495
88	862

It appeared that the machines, which were the expressed consideration of the instrument, had been taken from the possession of the defendant by the plaintiff and sold.

Held, that the result is a total failure of the consideration expressed in the instrument, and that, whatever remedy the plaintiff may have in the premises, this action, which is brought upon the instrument mentioned, to recover the price therein agreed to be paid by the defendant for the machines, cannot be maintained.

Action in the district court for Scott county to recover the balance due on a promissory note. On the trial, before *Macdonald, J.*, and a jury, the plaintiff introduced in evidence the instrument set forth in the opinion, and it further appeared from the complaint and undisputed evidence that plaintiff, previously to bringing this action, had taken the machines mentioned in the instrument from the possession of the defendant, sold them, and applied the proceeds in part-payment. The defendant had a verdict, and plaintiff appeals from an order refusing a new trial.

L. M. Brown and F. A. Merrill, for appellant.

Peck & McHale, for respondent.

BERRY, J. This action is brought upon the following instrument:

"\$240. BELLE PLAINE, MINN., October 5, 1878.

"On or before the first day of September, 1879, for value received in two M. L. reapers, I promise to pay, to the order of the Minneapolis Harvester Works, two hundred and forty dollars, at the office of Minneapolis Harvester Works, in Minneapolis, Minn., with interest at the rate of 12 per cent. per annum from date until paid; agreed, that if paid at maturity, (or in thirty days thereafter,) then the interest shall be nothing. And I further agree, in consideration of the credit herein given, that if this note is not paid when due, and suit is brought thereon, I will pay five dollars additional on the amount then due for attorney's fees, and the same may be included in the judgment. And I further agree to pay all other reasonable expenses incurred in collecting this note.

"The express condition of the sale and purchase of the machine for which this note is given is such that the title, ownership, or right of possession does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full. And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, even before the maturity thereof; and may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides. This note may be paid in good farmers' notes, taken and indorsed according to contract.

M. HALLY.

"P. O., Belle Plaine, County of Scott, State of Minn.

"Witness: P. B. NETTLETON."

The expressed consideration of the instrument is "value received in two M. L. reapers." It is expressly conditioned in the same "that the title, ownership, or right of possession" of the machines "does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full." It appears from undisputed evidence on both sides that the machines have been taken from the possession of the defendant by the plaintiff, and sold. This fact we understand to be also substantially alleged in the complaint. The result is that there is a total failure of the consideration expressed in the instrument. The case is one of a conditional sale; that is to say, of a transaction which was to take effect as a sale, so as to pass the title of the reapers and the right of possession upon payment therefor, and not otherwise. The defendant not only never acquired any "title, ownership, or right of possession of the machines," but he has by the act of the plaintiff been deprived of the power of acquiring any by paying the price specified in the instrument.

The case is similar to *Third Nat. Bank v. Armstrong*, 25 Minn. 530, where it is said that "the promise of payment and the implied obligation to transfer the title were mutual, and as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform the one would excuse performance as to the other." Whatever remedy, therefore, the plaintiff may have in the premises, this action, which is brought upon the instrument mentioned to recover the price therein agreed to be paid by the defendant for the machines, cannot be maintained.

The verdict was therefore right, and the order denying a new trial is accordingly affirmed.

THOMAS CHESTERSON *vs.* JOHN MUNSON.

April 22, 1881.

27	498
53	235

Appeal from Justice Court—Argument—Change of Venue.—An appeal upon questions of law alone, from a justice's judgment to the district court, may, with the consent of the parties, be heard and determined by the court in any county within its judicial district. Appearing and arguing such appeal before the court in another county than the one wherein the appeal is pending, without objecting to the jurisdiction of the court to try the same in such other county, is a waiver of all objections of that character.

Same—Time of Argument.—Such appeal may be placed upon the calendar and brought on for argument at the next term of the district court after the return of the justice is made and filed, unless continued for cause, although 30 days may not have elapsed since the allowance of the appeal.

Pleadings—Defective Complaint cured by Intendment.—A defective complaint in an action in a justice's court is cured by intendment after verdict or judgment, when the defendant has answered and gone to trial upon the merits without making any objection to the defective pleading, if the defects arise wholly out of an omission to plead expressly such facts as may be fairly implied from the allegations of the complaint.

Plaintiff brought this action in a justice's court in Cottonwood county, and had judgment after a trial. Defendant appealed to the district court for that county, on questions of law alone. The appeal was taken February 14, 1879, and on February 24, 1879, the plaintiff served notice of trial for the next general term of the district court to be held in Nobles county, in the same judicial district, on March 4, 1879. The appeal coming on for argument before *Dickinson, J.*, pursuant to the notice, the defendant appeared specially and objected to the hearing on the ground that thirty days had not elapsed since the trial before the justice. The objection was overruled and the cause argued and submitted by both parties, and judgment of affirmance entered, from which the defendant appeals.

The complaint, in addition to the causes of action mentioned in the opinion, states "that defendant had use of plaintiff's horse-rake, in 1874, raking hay, which use of said rake was worth \$3.00," and sets out nine other items in the same manner, concluding with the averment "that no part of the same has been paid, excepting * * *, although the same is long past due," and a demand for judgment.

Emory Clark, for appellant. The complaint avers no request and does not state a cause of action. *Bartholomew v. Jackson*, 20 John. 28; *Frear v. Hardenbergh*, 5 John. 272; *Force v. Haines*, 17 N. J. Law, 385; *Lampleigh v. Brathwait*, 1 Smith Lead. Cas. 222, and note. The objection need not be made, nor exception taken, in justice court, in order to a review on appeal. Gen. St. 1878, c. 65, § 117. The objection is not waived by failure to make it seasonably. Gen. St. 1878, c. 66, § 95; *Lee v. Emery*, 10 Minn. 151, (187;) *Bennett v. Phelps*, 12 Minn. 326; *Taylor v. Parker*, 17 Minn. 469; *Royce v. Gray*, 21 Minn. 329.

J. G. Redding, for respondent.

CORNELL, J. This is an appeal from a judgment of the district court of Cottonwood county, in affirmance of a judg-

ment rendered in a justice's court of that county in favor of plaintiff, and against the defendant, the same having been taken to the district court by appeal upon questions of law alone. It is disclosed by the record before us that the judgment in the district court was entered pursuant to an order of the district judge of said court, which recites that the appeal from the justice's court was "brought on for argument by notice on the part of the respondent before the court in Nobles county," which was embraced in the same judicial district with Cottonwood county; that the defendant appeared specially, and objected to the hearing on the ground that less than thirty days had then elapsed since trial, and that, upon the objection being overruled, the case was then argued by the counsel for the respective parties, and submitted upon the merits. This is all the record discloses indicating that the appeal was heard and determined in any other than Cottonwood county.

Upon this showing it is plain that the defendant waived all objection, if any existed, to the authority and jurisdiction of the court to hear and try the appeal in Nobles, instead of in Cottonwood county. By appearing and specially objecting that sufficient time had not elapsed, since the trial of the cause before the justice, to allow the hearing of the appeal, and then arguing the questions raised upon the appeal and submitting the same, he voluntarily consented to the trial of the appeal upon the merits by the court then sitting in Nobles county, with the like force and effect as though it had been tried in the proper county of Cottonwood. That the court had jurisdiction to try the appeal in that county with the consent of the parties is undoubted. The judge who held the court was the district judge of that judicial district, and, as such, was invested with all the powers belonging to the court in that district, subject only to such limitations upon their exercise as were prescribed by law. Const. art. 6, § 4. It had appellate jurisdiction over all

appeals in civil actions taken from the judgments of justices of the peace anywhere within that judicial district, (Const. art. 6, § 5,) and though it may be true that the statute regulating such appeals contemplates that such jurisdiction in each case shall, in the absence of any agreement of the parties to the contrary, only be exercised in the county wherein the appeal originated, it contains no prohibition upon its exercise in any other county, when consent is given. On the contrary, it may be fairly inferred that it may, in such case, be exercised; for it expressly provides that upon the filing of the return of the justice of the peace to any appeal, "the district court shall become possessed of the action, and shall proceed therein in the same manner, as near as may be, as in actions originally commenced in that court, except as herein otherwise provided," (Gen. St. 1878, c. 65, § 116;) and "a change of venue may, in all civil cases, be made, upon the consent in writing of the parties or their attorneys." Gen. St. 1878, c. 66, § 51, subd. 4. The consent given by the parties in this case, in open court, by voluntarily appearing by their attorneys, and trying the case upon the merits, was equivalent to a written consent. The case before us, therefore, must be treated the same as though the appeal from the justice was, in fact, tried by the district court in the county of Cottonwood.

The objection that the appeal could not be heard, because thirty days from the trial before the justice had not expired, was properly overruled. The provision of statute relied upon to support this objection (Gen. St. 1878, c. 65, § 123,) provides that "all appeals allowed thirty days before the first day of the term of the district court next after the appeal allowed, shall be determined at such term, unless continued for cause." This provision was intended to hasten, and not to delay, the trial of appeal cases from justices' courts. Its effect is not to prevent a trial when the case is properly on the calendar, and in a condition to be tried without prejudice

to the substantial rights of either party. In this case defendant made no suggestion that he was unprepared for the argument, or that a hearing at that time would result to his disadvantage.

The point that the complaint does not state a cause of action was not made in the justice's court, and is clearly not well taken. The statement "that the plaintiff worked for defendant in 1874, in the winter, one month and five and a half days, for which work defendant agreed to pay him \$12," comprises the essential facts of a good cause of action. The same is true of the statement, "that plaintiff worked in winter of 1875 for defendant one month and two days, which was worth, and defendant agreed to pay him, \$10.80." Each of these statements fairly imports a definite amount of work done by the plaintiff for the defendant, at an agreed price, which the latter promised to pay to the plaintiff. So, as to the last cause of action stated in the complaint, the allegations in respect thereto are sufficient, in the absence of any objection asking that they be made more definite and certain as to the amount of work done under the agreement by the plaintiff, in excess of that done by the defendant.

As the point which defendant makes goes to the sufficiency of the complaint as a whole, and not to any particular causes of action therein stated, it is evident, from what has already been said, that it cannot be sustained, though it be conceded that the other alleged causes of action are too defectively pleaded to admit of any recovery thereon. In respect to such other causes of action, however, the complaint is not so radically defective or wanting in its allegations as to furnish any grounds for a reversal of the judgment. Every fact essential to a recovery, which is not stated by some express averment, can be fairly and reasonably implied from the allegations made in the complaint. Both parties went to trial upon the merits and upon the pleadings as they stood, neither suggesting any defect in the pleading of his adver-

sary. The case is one, therefore, in which a defective complaint is cured by intendment after verdict or judgment. 1 Chitty Pl. 673; Moak's Van Santvoord, 832, 833.

Judgment affirmed.

COUNTY OF HENNEPIN *vs.* THOMAS L. GRACE.

April 26, 1881.

37	508
45	239
27	503
51	440
27	503
52	147

Exemption from Taxation—Parochial Schools — Play-ground.—A building which is devoted solely to the uses of a parochial school, where children of Catholic parents are received and instructed in such branches of education as are taught in the public common schools, and also in the tenets of the Catholic faith, no compensation being exacted therefor, and where children of parents holding other religious views are also admitted upon equal terms, with the privilege, however, of receiving religious instruction or not, as such parents may choose, no pecuniary profit being contemplated or derived from the school, is exempt from taxation under article 9, § 3, of the constitution, and Gen. St. 1878, c. 11, § 5, passed in pursuance thereof. Such exemption extends to the land occupied by the school-house, and such contiguous land, used in connection therewith as a play-ground for the children, as is not unnecessarily large for that purpose.

Same—Parsonage.—A parsonage, including the land belonging to it, is not exempt from taxation as church property used for religious purposes; following on this point *St. Peter's Church v. County of Scott*, 12 Minn. 395.

Case certified from the district court for Hennepin county, under Gen. St. 1878, c. 11, § 80, on application of the plaintiff.

In proceedings to enforce payment of delinquent taxes on lots 1, 2, 3, 4, 5, 6 and 7, in Bottineau's addition to St. Anthony, in that county, Thomas L. Grace filed an answer, objecting that the property was exempt from taxation. The issue was tried by *Young, J.*, who found that the defendant, as Roman Catholic bishop, owns and holds the property in

trust for the parish of St. Anthony of Padua, a parish of his diocese, and made further findings of fact as follows:

"Upon lots 8 and 9 in said block 8 is situated a school-house, where the children of the Catholic families of said parish attend, and are instructed in the branches of learning usually taught in the common schools of this state, and, in addition thereto, are given certain religious instruction peculiar to the Catholic faith. Said school is also open to all such children of families other than Roman Catholic as desire to attend, and are willing to conform to the rules of the school. The number of scholars attending said school is between 300 and 400 children. Children of non-Catholic parents are not required to receive religious instruction.

"Upon the rear of lots 4, 5, 6 and 7 is situated a dwelling-house, occupied by the Catholic priest of said parish as a residence, said dwelling-house occupying but a very small portion of said lots. Upon lots 8 and 9 in said block 8 is situated a church, regularly used by the parishioners of said parish as a house of public worship, which lots were not assessed. The balance of said block 8, not occupied by said church, school-house and dwelling-house, is used as playground for the children attending said school.

"Each scholar attending said school is expected to pay for tuition fifty cents per month, if able to do so; but none are refused admittance for non-payment of the same. The amount so received falls short of sustaining the school by about forty dollars per month, which deficiency is made up by said church organization, by pew-rent. None of said property is used with a view to profit."

As conclusions of law the court held that the school is an institution of purely public charity, within the meaning of the constitution; that all of the lots except that part of lots 4, 5, 6 and 7 occupied by the dwelling-house are actually occupied by the school, and are exempt from taxation; that so much of those lots as are occupied by the dwelling-house are

not exempt; but in the absence of evidence with regard to the parts or portions of such lots so occupied, the tax on each lot cannot be divided or apportioned, and the whole must, therefore, be set aside, leaving the parts of the lots which are taxable to be reassessed.

W. E. Hale, for plaintiff.

Lochren, McNair & Gilfillan, for defendant.

CORNELL, J. Upon the findings of fact the dwelling-house, together with the land within the enclosure surrounding it, which was used and occupied as a place of residence for the parish priest, was clearly subject to taxation, under the authority of *St. Peter's Church v. County of Scott*, 12 Minn. 395. The direct use made of the property was a secular, and not a religious one. The fact that the priest who occupied it, and for whose occupation as a residence it was intended, devoted himself exclusively to the service of the church to which it belonged, whereby the religious interests of the church were subserved, did not change the character of the occupancy, or make the direct use of the property any the less a secular one. The ruling upon this point in 12 Minn., *supra*, has been long acquiesced in and acted upon as settled law, and, in our opinion, no sufficient reason exists for changing it by judicial decision at this late day.

By the decision of the district court, the parochial school building, together with the land whereon it is situated, and the adjacent grounds used in connection therewith for a play-ground, is held to be exempt from taxation under section 3, article 9, of the constitution, and the statute enacted in pursuance thereof, (Gen. St. 1878, c. 11, § 5,) on the ground that the school itself is an institution of purely public charity within the meaning of that clause of the constitution, and that the land used for a play-ground is needed by the children for the beneficial enjoyment of the school, and is not unnecessarily large for that purpose. The case cited and relied upon in support of this position (*Gerke v. Purcell*, 25 Ohio, 229) fully sustains the view thus taken by the court,

and justifies the legal conclusion it reached upon its findings of fact. The establishment and maintenance of a school of the character mentioned, out of revenues of the church, and the voluntary contributions of those of its patrons who are able and willing to give, no pecuniary profit being derived therefrom nor expected, the same being open upon equal terms to all children of Catholic parents belonging to the parish, and to all others living therein, of whatever religious belief, who may desire to avail themselves of the same, it being left optional with the latter to receive religious instruction or not, as their parents may choose, is, in the legal sense, not only a charity, but one wholly and entirely of a public nature, and therefore a purely public one. As such, the institution is not a proper subject of taxation, though it be conceded, as it seems to be by counsel, that it is not exempt as a seminary of learning, within the meaning of the constitution; and, under the statute, the building and land belonging to it, and essential to its beneficial use and enjoyment, are also exempt.

It may well be questioned, however, whether, in specifically enunciating as the subject of exemption "public school-houses, academies, colleges, universities, and all seminaries of learning," it was not intended to include in the last-named class all schools of an educational character not mentioned in the preceding part of the section. The word "seminary" has no fixed legal meaning. Abbott's Law Dict., "Seminary." It is defined by Webster to be "a place of training; institution of education; a school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments." The origin of the word would seem to imply the place where the seeds of an education are sown and implanted. It is neither a strained nor unnatural construction to hold that it was used in the clause under consideration in its broadest sense, to denote any and every place of training or institution of learning not already specifically named.

The school in question is not of the class of public schools

which are required to be established, and which are provided for in the constitution, (article 8, §§ 1, 2, 3,) for it is not established by public authority, and the title to the property belonging to it is not vested in the public. A parish school building is not, therefore, a "public school-house" in the sense in which that phrase is used in section 3, article 9, of that instrument. It may, however, be regarded as a seminary of learning, inferior to an academy, college or university, but of like grade with the public common schools, and, like them, open to the public upon equal terms to all; and, as such, it is entitled, together with the necessary grounds used in connection with it, to the benefit of the exemption.

The questions certified to us were decided correctly by the district court, and its decision is accordingly affirmed.

GILFILLAN, C. J. I concur in the result in this case, but doubt that the school comes under the head of "public charities" in the constitution. It is, within the meaning of that instrument, a "seminary of learning," and as such exempt from taxation.

OLIVER DINGMAN vs. STILES RAYMOND.

April 26, 1881.

Exemption from Execution—"Buggy."—A "buggy" being "a single-seated, one-horse, covered vehicle or pleasure carriage, designed and adapted for carrying persons only," and as such used by the owner, is not exempt from execution as a "wagon."

Appeal by defendant from a judgment of the district court for Goodhue county, *Crosby*, J., presiding, on appeal from justice court, in an action by plaintiff to recover possession of a buggy, taken under execution by defendant as constable.

F. W. Hoyt, for appellant.

Wilson & Skillman, for respondent.

BERRY, J. The stipulation of the parties and the findings of the district court, with reference to the thing in controversy, are "that said buggy is a single-seated, one-horse, covered vehicle or pleasure carriage, designed and adapted for carrying persons only, and as such was used by said plaintiff; and the same was the only buggy or wagon owned by plaintiff at the time of said levy." Gen. St. 1878, c. 66, § 310, exempts from sale on execution "one wagon, cart, or dray, one sleigh, two plows, one drag, and other farming utensils * * * not exceeding \$300 in value." I am of opinion that this does not cover a buggy like that in question, which is evidently what is popularly known and designated as a top or covered buggy or phaeton. Such a buggy is not a wagon, any more than it is a cart or dray, for what seems to me to be a plain, simple, and conclusive reason, viz.: that "wagon" is not the name or a name by which such buggy is designated, described or referred to in common acceptance.

GILFILLAN, C. J., and CORNELL, J. We concur in the result arrived at in the foregoing opinion, on the ground that it does not appear that the buggy was kept and used for any purpose but pleasure. For that purpose it was not within the spirit (and it is not within the letter) of the statute. If a buggy be necessary to, and be kept and used by the owner in his business, it may be within the spirit of the statute, and so exempt. But such is not this case.

Judgment reversed.

LEVI L. COOK *vs.* FRANK SLOCUM and another.

37 509
44 378

April 27, 1881.

Local Improvement—Widening and Straightening a Street.—Widening and straightening a street in a city is a local improvement within the meaning of section 1, art. 9, of the constitution.

Same—Determination that Benefits Equal Cost.—In ordering such an improvement to be made, under sections 9 and 10, *subc.* 10, of the charter of the city of Minneapolis, Sp. Laws 1878, c. 25, the common council substantially determine that the benefits which will accrue to property locally affected by the improvement will equal the cost of paying for the lands taken or injured by it.

Same—Order to Ascertain Damages and Assess Benefits.—And its direction to the commissioners appointed, to ascertain the amount of such damages and compensation, and to assess the amount thereof upon the property to be benefited thereby, is equivalent to directing them to ascertain all the lands which will be locally benefited by the improvement, and to apportion the amount upon them, in proportion to the benefits received by each.

Same—Report of Commissioners—All Property Benefited Assessed.—The report of the commissioners in such case, stating the amount of damage and compensation as to each piece of land taken or injured, and that they "then assessed the amount of such compensation and damages, so awarded, upon the land and property benefited by such proposed improvement, assessing the same upon the several parcels in proportion to the benefits which each parcel will receive from such improvement, conformably to the rules laid down in said city charter in that behalf, and that schedule B, hereto attached and made a part of this report, is our assessment list," shows that they assessed the benefits on all the property benefited.

Same—Benefit—Vacating Portion of Street.—Where, in straightening a street, land on one side is released from the public servitude, that is a benefit to the tract of land to which the land so released belongs, which may be considered by the commissioners in assessing benefits upon such tract. The report, in such case, where part only of a tract is to be taken, and the damage for taking such part is reported, need not state that, in estimating the damage, the commissioners took into consideration the benefits to the part of the tract not taken.

Plaintiff, being owner of lot 1, block 29, in Snyder & Co.'s addition to Minneapolis, which had been assessed for widening and straightening Nicollet avenue in that city, brought

this action in the district court for Hennepin county against the defendant Slocum, as county treasurer, and against the city, to have the assessment declared void, and to restrain the sale of the lot. The defendants demurred to the complaint. The demurrer was overruled, and they answered, and plaintiff demurred to the answer. This demurrer was sustained by Young, J., and the defendants appealed.

R. C. Benton and W. E. Hale, for appellants.

Atwater & Atwater, for respondents.

The assessment was void, there being no finding or determination that the land assessed was benefited to the amount of the assessment. Const. art. 9, § 1; *Rogers v. City of St. Paul*, 22 Minn. 494; *Cooley on Taxation*, c. 20, §§ 1, 4 and 5; *City of Chicago v. Larned*, 34 Ill. 203; *Lee v. Ruggles*, 62 Ill. 427; *Warren v. Grand Haven*, 30 Mich. 24; *Passaic v. State*, 37 N. J. Law, 538; *State v. Passaic*, Id. 137; *State v. Paterson*, Id. 380.

The assessment was made on an erroneous principle, and was therefore void. *In re William, etc.*, 19 Wend. 678; *State v. Elizabeth*, 37 N. J. Law, 330; *Matter of N. Y. Prot. Episcopal Public School*, 75 N. Y. 324; *Cooley on Taxation*, c. 20. The report fails to show that all lands benefited were assessed. *State v. Essex Public Road Board*, 37 N. J. Law, 273; *Hassen v. City of Rochester*, 65 N. Y. 516; *Weller v. City of St. Paul*, 5 Minn. 70, (95;) *State v. Town of Bergen*, 29 N. J. Law, 266.

CORNELL, J. By article 9, section 1, of the constitution, it is provided "that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe." Within the meaning of this clause of the constitution, widening and straightening part of a public street in a particular locality in a city is a local improvement, and, under the

authority thus expressly reserved to the legislature, it is competent for it to confer upon a municipal corporation the requisite power to make any such improvement, to take and appropriate whatever land may be necessary therefor, to ascertain the damages occasioned thereby, to assess and apportion the amount thereof upon such land in the vicinity as may be benefited by it, and to prescribe the manner in which it shall be done. In prescribing the manner, it may authorize the common council of a city to create a special tribunal or commission to ascertain, upon a view of the premises and other evidence, the amount of damages caused by the improvement for land taken or injured, and also to determine what land in the vicinity will be benefited, and to assess and apportion the amount of such damages upon the property so to be benefited proportionately in accordance with the benefits received. It is also competent for it to provide that the judgment of the tribunal so created shall be final, in the absence of any fraud or mistake, in respect to all questions as to what property will be benefited by the improvement, and as to the benefits received by each parcel. *Rogers v. City of St. Paul*, 22 Minn. 494; *Carpenter v. City of St. Paul*, 23 Minn. 232; *Cooley on Taxation*, c. 20, pp. 416, 417, 420, 421, and 448 to 451.

The charter of the city of Minneapolis, under which the proceedings herein were had, (Sp. Laws 1878, c. 25, *subc.* 10, § 9,) among other things, authorizes the common council, (page 227,) "in its discretion, to lay out and open new streets, lanes and alleys in said city, and to widen, straighten, or extend any street now existing or which may hereafter exist, and to purchase or condemn for such purposes any real estate or interest therein which is private property; * * * to provide for the payment of the value of such property as may be taken, and damages done to private property by means of any such improvements, * * * by assessing, levying and collecting the expense of the same by special assessment upon the property to be benefited by such improvements, in

each case in proportion to benefits, and without regard to a cash valuation."

The mode of exercising this authority, and the various steps to be taken in exercising it, are particularly specified in section 10, which provides for a vote of the council directing the improvement, a plat and survey of the same by the city engineer, filing it with the city clerk after its approval and adoption by the council, so as to show correctly the character, course and extent of the improvement agreed upon and ordered, together with the property necessary to be taken or interfered with, and the names of the owners, so far as known, and for the appointment of five commissioners "to view the premises, and to ascertain and award the amount of damages and compensation to be paid to the owners of property which is to be taken or injured by the improvement, and to assess the amount of such damages and compensation * * * upon the lands and property to be benefited by such improvement, in proportion to the benefits to be received by each parcel, and without regard to a cash valuation." These commissioners, after qualifying in the manner provided, and giving the requisite notices as prescribed, are to meet at a time and place designated, for the purpose of giving interested parties an opportunity to be heard and to give evidence; and they are required to "view the property proposed to be taken or interfered with for the purpose of such improvement, and ascertain and award therefor compensation and damages, and view the premises to be benefited by such improvement, and assess thereon, in proportion to benefits, the amount necessary to pay such compensation and damages," and, upon such view being had and evidence given, they are to make "a true and impartial appraisement and award of the compensation and damages to be paid to each person whose property is to be taken or injured. * * * The said commissioners shall then assess the amount of such compensation and damages so awarded upon such land and property benefited by such proposed improvement; * * * as-

sessing the same upon the several parcels, in proportion to the benefit which each parcel will receive from such improvement, and deducting therefrom any damages or injury to the same parcels which is less than the benefits, and assessing only the excess." Upon the making of this award and assessment, the same is to be reported to the common council, who may, upon a notice of at least two weeks, annul or confirm the same. In case it is confirmed, the award and assessment are declared to be final and conclusive upon all parties interested, except as otherwise provided in the charter, and the council thereupon proceeds to levy the assessments in accordance with the confirmation, and in the manner therein directed.

Upon the undisputed facts disclosed by the pleadings herein, the proceedings that resulted in the assessments complained of were not only in substantial, but in strict compliance with the provisions of the charter, and if the assessments are invalid at all, it is clearly owing to some defect in the charter, and not to any defect or irregularity in the proceedings under it. It is objected that the statute in this case contains no provision for a finding, by any one, that lands can be found which will be benefited by any improvement of this character to the amount of damages that may be awarded for it, and that the report of the commissioners in this case shows no finding that the lands which were assessed were benefited to the amount of the assessment, or that they embraced all the lands benefited by the improvement, and, therefore, the assessment is void because not shown to rest upon the principle which underlies all special assessments, and which supposes that the property so assessed will be enhanced in value on account of the improvement to an amount equal to the burden imposed. These objections are not, in our opinion, sustained by any fair and reasonable construction of the statute, or of the report of the commissioners. The delegation to the common council, in cases of

this kind, of an authority to condemn property necessary to be taken for the improvement, and to assess, through a tribunal of its appointment, the damages therefor upon property specially benefited thereby, is a distinct legislative declaration of the local character of the improvement, and that the lands in the locality thus specially affected by it may be sufficiently enhanced in value to compensate for the burden of sustaining the whole expense. Whether, in point of fact, this is actually true in every or any particular case, is not a question for the judiciary to determine, it being conceded that the improvement is one of a character contemplated by the legislature. Cooley on Taxation, 428, 429.

In the exercise of the discretion and authority given to it, the common council in this case, in ordering the improvement to be made in accordance with the plat and survey of its city engineer, and at the expense of property especially benefited thereby, substantially determined that the benefits which would accrue to property locally affected by the improvement would equal the cost of paying for the lands taken for or injured by it, and its direction to the commissioners to ascertain the amount of such damages and compensation, and to assess the amount thereof proportionally upon the property to be benefited thereby, was equivalent to directing them to ascertain all the lands which would be locally benefited by the improvement, and to apportion the amount upon them in proportion to the benefits received by each. The report of the commissioners states the amount of damage and compensation awarded as to each parcel of land taken or injured, and that they "then assessed the amount of such compensation and damages so awarded upon the land and property benefited by such proposed improvement, assessing the same upon the several parcels in proportion to the benefits which each parcel will receive from such improvement, conformably to the rules laid down in said city charter in that behalf, and that schedule B, hereto attached and made a part of this

report, is our assessment list." If, as stated, they assessed the amount upon the land and property benefited, it was upon all the land and property which was so benefited, and no other presumption can fairly be drawn from the report.

In straightening the street in question, that part of it lying next to and adjoining lot 1, block 29, Snyder & Co.'s first addition, was necessarily vacated. It is admitted by the pleadings that the part thus vacated constituted a portion of said lot 1, the fee of which belonged to the plaintiff. The effect of the change and vacation, therefore, was to relieve from the servitude of a public easement that part of plaintiff's lot which had theretofore been occupied for a street, and to restore to him the absolute control and unrestricted enjoyment of his entire property, for all purposes. This was a benefit to the lot which it was competent for the commissioners to consider, in determining the amount of benefits accruing to it by reason of the improvement. The fact that the city also quitclaimed to plaintiff the same premises thus vacated is of no importance, as it conveyed nothing in addition to what was released by the act of vacation.

In reporting an appraisalment and award of compensation and damages in respect to a tract of land, where only a part is taken, the statute does not require a statement in the report whether the commissioners took into consideration the question of benefits to that part of the tract not taken, in arriving at the amount of their award, and an omission in this regard is not fatal to the award.

The property which was taken in this case, and for which the compensation was awarded that constituted the basis of the special assessment, is indicated in the report with sufficient certainty to avoid any misapprehension as to the particular property intended, and to satisfy the requirements of the statute. Whether, under section 11, a right of appeal is given from an assessment, claimed to be irregular or invalid, by an aggrieved party, need not be decided, inasmuch as, upon the facts disclosed by the pleadings in this case, the

proceedings herein were authorized and regular, and hence no ground exists for the relief sought.

The demurrer to the answer was improperly sustained, and the decision of the court thereon is reversed.

JAMES G. FREEMAN vs. WILLIAM CARSON and others, impleaded, etc.

April 28, 1881.

Mechanic's Lien — Destruction of Building before Filing of "Account." — A "mechanic's lien" for labor performed and materials furnished and used for the repairing of a building, is not terminated by the destruction of the building by fire after the performance and furnishing of such labor and materials, but before the "account," provided for by Gen. St. 1878, c. 90, § 7, is filed for record; but may, notwithstanding the destruction of the building, be enforced against the land on which it was situated.

Appeal by defendants from a judgment of the district court for Washington county, where the action was tried by Crosby, J.

McCluer & Marsh, for appellants, cited *Milner v. Norris*, 13 Minn. 455; *Dobbs v. Enearl*, 4 Wis. 451; *Farmers' Bank v. Winslow*, 13 Minn. 86; Houck on Liens, §§ 160, 204; Phillips on Liens, § 12; *Presbyterian Church v. Stettler*, 26 Pa. St. 246; *Wigton & Brooks's Appeal*, 28 Pa. St. 161.

Mead & Thompson, for respondent.

CLARK, J.¹ The plaintiff furnished materials and machinery, and performed labor, commencing on the 12th day of April, 1876, and between that date and the 27th day of September of the same year, under a contract with the defendants Charles S. and William S. Getchell, for repairing a mill in Washington county, Minnesota, which, together with the land on which it was situated, comprising five acres, not

¹Berry, J., because of kinship to one of the parties, did not sit in this case, and Cornell, J., because of illness, took no part in the decision.

within the limits of any city, town, or village plat, was owned by them, and such materials and machinery were used for the purpose. On the 27th day of September, 1876, the mill and a portion of the machinery attached thereto were destroyed by fire, and the mill has not been rebuilt. On the 31st day of October, 1876, the plaintiff duly made and filed an "account," under and pursuant to the provisions of Gen. St. 1878, c. 90, § 7, claiming a lien on the above-mentioned premises for the amount due him for such labor, machinery and materials, which was duly recorded on the same day.

This action was brought to enforce such lien, and judgment was entered in the court below, decreeing the amount found to be due the plaintiff for such labor and material to be a specific lien upon all the right, title and interest which the Getchells had in the said real estate, and the appurtenances thereof, on and after the 12th day of April, 1876, and a sale of the premises to satisfy the same. The defendants Carson, Rand, Sherfey and Gilman, having acquired an interest in the said real estate subsequent to the above-mentioned transactions, defended, and they have appealed from the judgment to this court. They claim that the plaintiff's lien became extinct upon the destruction of the building, and that the judgment, in so far as it decrees a lien upon the land, is not justified by the facts found by the court—which are above stated, so far as they are deemed material—and is erroneous.

The ground urged upon us for this claim is that the lien given by the statute is upon the structure, and attaches to the land only so far as its use is necessary to the enjoyment of the building in the construction of which it had its origin; and it is urged that such a construction of the statute is in accordance with just views of equity and public policy. But we are clear that no such construction of the statute is admissible. The "mechanic's lien," so called, is a creature of the statute, and exists exclusively under and in accordance with its provisions. The language conferring the

lien is: "Shall have a lien * * * upon such house, mill, manufactory, or other building, and appurtenances, * * * together with the right, title or interest of the person owning such house, mill, manufactory, or other building, and appurtenances on and to the land upon which the same is situated, not exceeding forty acres; and if erected within the limits of any city, town, or village plat, the lot of ground on which said house, mill, manufactory, or other building, and appurtenances, is erected, not exceeding in extent one acre." Gen. St. 1878 c. 90, § 1.

In *Milner v. Norris*, 13 Minn. 455, it was held that the lien becomes operative from the time of the commencement of the performance of the labor or the furnishing of the materials, as against a mortgagee whose lien attached thereafter, but before the filing for record of the account; and, *a fortiori*, it becomes operative at the same time as against the owner of the premises. Whatever may be thought of the equity or policy of so doing, the statute, in explicit terms, imposes the lien upon the title to the land. The cases in Pennsylvania, to which we are referred, arose upon statutes so worded as to be open to the construction put upon them by the courts of that state; but the terms of the statute of this state, imposing the lien upon the land, are so explicit as to leave no room for construction in this respect.

The decision of the court below having been in accordance with these views, the judgment appealed from must be affirmed.

E. RAY FENNO vs. R. H. CHAPIN.

April 28, 1881.

27 519
40 76

Immaterial Evidence—Certain evidence, offered on the trial, *held* to have been properly excluded as immaterial.

New Trial—Newly-discovered Evidence—The affidavits in support of a motion for a new trial, on the ground of newly-discovered evidence, *held* insufficient, for the reason that they failed to show that the party applying for the new trial could not, with reasonable diligence, have discovered and produced this evidence on the trial.

Appeal by plaintiff from an order of the district court for Steele county, *Buckham, J.*, presiding, refusing a new trial.

J. M. Burlingame and *A. C. Hickman*, for appellant.

Lewis L. Wheelock and *Amos Cogswell*, for respondent.

MITCHELL, J.¹ This was an action to recover the possession of a "Rowell seeder," of which plaintiff claimed to be the owner. Defendant denied plaintiff's ownership, and alleged property in himself. A verdict was rendered for the defendant, and plaintiff moved for a new trial on the grounds of—*First*, errors in law occurring at the trial; *second*, newly-discovered evidence. The motion having been denied, the plaintiff appealed to this court.

Upon the trial it appeared from the evidence that the seeder in question originally belonged to plaintiff, and that he delivered the actual possession of it to one Jepson, under a contract of sale, and accepted from him his promissory notes for the purchase-money thereof, which contained the following condition: "The express conditions of the above contract for said seeder are such that the right or title of possession" (probably meaning title and right of possession) "does not pass from the said E. Ray Fenno until the same, with interest, is paid in full." That subsequently defendant, for a valuable consideration by him paid, purchased the said seeder from Jepson. Jepson never paid plaintiff the pur-

¹Cornell, J., because of illness, took no part in this decision.

chase-money. Plaintiff claimed the seeder under the conditions contained in the notes referred to. Defendant claimed it as an innocent purchaser from Jepson for a valuable consideration. Defendant introduced evidence tending to prove that he had no notice of plaintiff's claim when he purchased from Jepson. Plaintiff introduced evidence tending to show that defendant purchased with notice of his claim. After showing that he had the exclusive right to sell these "Rowell seeders" in Steele county, plaintiff offered to prove that this fact was known to defendant, and that his (plaintiff's) name was upon the seeder in question. This evidence, being objected to as immaterial, was excluded by the court, to which ruling plaintiff excepted. This is the only exception taken by plaintiff on the trial. We think the ruling of the court excluding this evidence was correct. There was nothing in either of these facts, if proved, tending to charge defendant with notice of plaintiff's claim to the property.

Plaintiff's other ground of motion for a new trial, to wit, newly-discovered evidence, is supported by his own affidavit, that since the trial he has discovered that one Hadley, a resident of Owatonna, was present at the sale from Jepson to defendant, and heard Jepson tell him that plaintiff had a claim against the seeder, to which defendant replied that he would take it subject to such claim. This is supported by Hadley's affidavit. The only excuse offered by plaintiff for not producing Hadley as a witness on the trial was that he did not know that Hadley knew anything about the transaction until he heard the deposition of Jepson read on the trial. The deposition referred to was introduced by plaintiff himself, and was taken May 28th, (the trial occurred in June following,) and in the deposition Jepson had testified that Hadley was present at the sale by himself to defendant. Owatonna, the residence of Hadley, was the place of trial, and there is nothing to show that Hadley was absent from home. Under such circumstances, the court below was amply justified in refusing a new trial, for the reason, irrespective of

others, that the affidavits failed to show that plaintiff could not, with reasonable diligence, have discovered and produced this evidence at the trial.

Order affirmed.

STATE OF MINNESOTA *vs.* HENRY LOOMIS.

27	521
88	501

April 29, 1881.

Demurrer to Indictment—Review of Order Overruling.—An order overruling a demurrer to an indictment cannot be brought before this court for review under Gen. St. 1878, c. 117, § 11, after a trial and verdict upon an issue of not guilty.

Motion in Arrest of Judgment.—Upon a motion in arrest of judgment after verdict, in a criminal case, the only questions that can properly be raised are such as relate to the sufficiency of the indictment upon the facts stated, and the jurisdiction of the court.

Indictment—Larceny of Warehouse Receipts—Authority to Issue.—In an indictment for the larceny of warehouse receipts alleged to have been issued by a railroad company named in the indictment, a want of any allegations showing that the company had legal authority, under its charter, to issue the same, is not a fatal defect. It is enough, in this regard, if the facts stated show a liability against the company in respect to the receipts in favor of any lawful holder of the same, which it would be estopped from denying by setting up a want of authority.

Same—Pleading Private Statute.—The statutory rule in respect to pleading a private statute, in an indictment, (Gen. St. 1878, c. 108, § 13,) by a reference to its title, and the day of its passage, has no application to a case where, at common law, such statute need not have been pleaded.

Warehouse Receipts—Sale and Delivery without Indorsement.—The title to warehouse receipts, which the statute makes negotiable, transferable by indorsement, may also be passed by a sale and delivery of the same without indorsement.

The defendant was indicted for, and convicted of the crime of larceny, in the district court for Nicollet county. A motion in arrest of judgment having been denied by *Dickinson, J.*, (acting for the judge of the 9th district,) before whom the defendant was tried, the case was certified to this court under Gen. St. 1878, c. 117, § 11.

Upon being arraigned, the defendant demurred to the indictment, but the demurrer was overruled, and he pleaded not guilty, and after a trial was convicted of the larceny of nine elevator tickets or receipts, of the value of \$515.

The indictment contained the following allegations: "That heretofore, * * * the Saint Paul & Sioux City Railroad Company were, and now are, a corporation in the state of Minnesota, duly established and organized under and by virtue of the laws thereof, and that during all said time, the said Saint Paul & Sioux City Railroad Company did own and operate a grain elevator, * * * said grain elevator being * * * used for the reception and storage of wheat and other grains, for shipment; and the said Saint Paul & Sioux City Railroad Company, * * * did operate said elevator and do business therein under the name of the Saint Paul & Sioux City Elevator Company." Continuing, the indictment sets out the issuance by the railroad company, through its authorized agent, one C. F. Johnson, and delivery to one W. Waterman, of nine "certain accountable receipts for personal property, to wit, wheat; said receipts being elevator tickets, so called" and of the following form:

The wheat named herein is insured by the company, and is subject to charges for insurance and for storage, the published rates, until surrendered for shipment.	SAINT PAUL & SIOUX CITY ELEVATOR COMPANY.
	Saint Peter, 5 mo., 14 day, 1877.
	Received of W. Waterman Load No. 2, Ticket No. 19,405,
	account of W. W., or bearer.
	No. 2 Wheat, Bin No. 3.
lbs.41 20-60th Bushels.
	C. F. Johnson, Inspector.

—Each of these receipts being issued and delivered to Waterman, upon his delivery to the railroad company of the wheat mentioned therein. The indictment then alleges that "the said Saint Paul & Sioux City Railroad Company, upon the delivery to said company of the said tickets, as aforesaid, and

upon the surrender of the same by the holder thereof, as aforesaid, became and were responsible to such holder for the amount and quantity of the wheat so mentioned in said receipt or receipts; and the receipts aforesaid were good and valid orders on and against the said company, * * * and that the Saint Paul & Sioux City Railroad Company were at said time responsible to the holder or holders of said tickets for the amount and quantity of wheat so called for in each of said tickets." The indictment, after setting out the transfer and delivery of the receipts by Waterman to Prael & Dubinsson, and the value of the receipts, charges the defendant with the larceny of the same from said Prael & Dubinsson and concludes in the usual form.

M. G. Hanscome and Sumner Ladd, for defendant.

An indictment must contain all the essentials to constitute the offence and cannot be aided by intendments. U. S. Crim. Dig. p. 340, §§ 79, 80; p. 342, § 114; p. 349, §§ 212, 220; p. 346, § 153; p. 360, § 363; p. 369, § 479; *State v. McIntyre*, 19 Minn. 93; *State v. Philbrick*, 31 Me. 401; 1 Bish. Cr. Law, § 813 and note 1. To render bonds, notes, etc., the subject of larceny they must be at the time legally valid and subsisting securities. *State v. Wheeler*, 19 Minn. 98; 2 Russ. on Crimes, 74; *Wilson v. State*, 1 Port. (Ala.) 118; *Culp v. State*, 1 Port. (Ala.) 33; *People v. Shall*, 9 Cow. 778. The wheat tickets import no validity on their face. *State v. Wheeler*, 19 Minn. 98. No authority in the railroad company to issue these tickets is shown, and no information is given as to any of its powers or purposes. The powers of the railroad company are not matters of presumption. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327.

Being incorporated under a private statute, this statute should have been pleaded. *Horn v. Chicago & N. W. Ry. Co.*, 38 Wis. 463; 1 Chitty Pl. 216; Gen. St. 1878, c. 66, § 110; *Hewett v. Town of Grand Chute*, 7 Wis. 282; 1 Bl. Com. 86; Smith on Stat. Const. §§ 795, 827, 828, 831; *Ohio & Ind. R. Co. v. Ridge*, 5 Blackf. 78.

The ownership of goods must be proved as laid. These wheat tickets could only be transferred by *endorsement* and *delivery*. Gen. St. 1878, c. 124, § 17.

Chas. M. Start, Attorney General, for the State.

CORNELL, J. The case is before us upon a certified report of the district judge of the sixth judicial district, under Gen. St. 1878, c. 117, § 11, for the purpose of obtaining a review of certain rulings of the district court, in overruling a demurrer to the indictment, and also in denying a motion in arrest of judgment after verdict. It is objected by the attorney general that the order overruling the demurrer is not now properly before us for review, because an issue, under a plea of not guilty, has since been made and tried, and it is now too late to question the correctness of that order in this court, except it be brought before us in the ordinary way, by appeal or writ of error.

In our opinion the point is well taken. The statute under which those proceedings are had, provides that "if, upon the trial of any person who shall be convicted in any district court, * * * or if, upon any demurrer to an indictment, or to a special plea or pleas to an indictment, or upon any motion upon or relating to an indictment, any question of law shall arise, which, in the opinion of the judge of such court, shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case, so far as may be necessary to present the question or questions of law arising therein, and certify the said report to the supreme court of the state; and thereupon all proceedings in said cause shall be stayed until the decision of said supreme court shall be made." According to a familiar rule of construction, the first clause of this section can have no application to any of the cases therein afterwards particularly mentioned, for if the latter were included by that clause, their subsequent specific enumeration was wholly unnecessary.

In providing this new and additional mode of obtaining a

review of any question decided upon a demurrer to an indictment, which the trial court may deem of doubtful and important character, the statute expressly authorizes a stay of all subsequent proceedings until the adjudication of the question in the appellate court. The obvious purpose of the statute was to enable the trial court, with the consent of the defendant, before the trial of any issue upon the indictment under a plea of not guilty, to procure, for its guidance in the subsequent proceedings in the action, an authoritative decision of any doubtful and important question raised by the demurrer, thereby saving, perhaps, much of the labor and expense that might otherwise arise in the final disposition of the case upon the merits. Whenever, therefore, any such question, decided upon a demurrer, is sought to be certified up to the supreme court, it must be done before any issue of fact is presented and tried; otherwise the correctness of the ruling of the trial court in determining the issue upon the demurrer can only be reviewed in the ordinary way, on appeal or by writ of error. Of the questions which are certified to us in this case, cognizance can therefore only be taken of the one which relates to the sufficiency of the indictment upon the facts therein stated, as that is the only one that was properly before the trial court for adjudication on the motion in arrest of judgment, no question of jurisdiction being made in the case. Gen. St. 1878, c. 111, § 11.

The indictment is for the larceny of certain so-called elevator tickets or warehouse receipts, which are copied and described *in hæc verba*, and are alleged to have been issued and delivered by the St. Paul & Sioux City Railroad Company to one W. Waterman, for certain named quantities of wheat, stated to have been received from him, for storage and shipment, at its elevator at Kasota. The sufficiency of the indictment is assailed, mainly, on the ground that the receipts themselves, although alleged to be worth respectively the specific sum therein stated, are nevertheless not shown, by any proper averments of fact, to be of any value, or to con-

stitute any binding obligation upon the railroad company, or to create any liability against it in favor of any one. In support of this position it is urged—*First*, that the general allegation that said company was, during the time covered by the transactions referred to, and is, "a corporation in the state of Minnesota, duly established and organized under and by virtue of the laws thereof," is fatally defective in not stating whether such incorporation was under the general laws of the state authorizing the formation of railroad companies and defining their powers, or some private statute; for, if under the latter, the court cannot take judicial notice of its provisions and the powers they confer, without being properly pleaded by a reference to its title and the day of its passage, in accordance with the statutory rule in pleading a private statute or any right derived therefrom, (Gen. St. 1878, c. 108, § 13;) and hence it cannot be determined, upon the face of the indictment, whether the said company had any authority to issue the tickets, or do the several acts and things alleged to have been done by it in connection therewith; and, *second*, that there are no allegations of fact showing that the said company owned, controlled or operated any line of railroad, or that it had any corporate powers or authority to hold and operate an elevator, or to do any of the acts it is alleged to have done in connection therewith, or with the issue of said warehouse receipts, and hence, for aught that appears, the same are illegal and void.

Assuming that the railroad company was in fact incorporated under a private statute, it was sufficient to aver its corporate existence in the manner here done, without pleading the statute. Under the common-law rule, its act of incorporation need not have been pleaded in this case, because the offence charged is not for violation of any of its provisions; nor is it predicated upon it. As the statutory rule (Gen. St. 1878, c. 108, § 13) in respect to pleading a private statute in an indictment, by a reference to its title and the day of its passage, was only intended for those cases where,

at common law, it was necessary to plead such statute, it follows that the rule referred to has no application to the case at bar. *Dodge v. Minn. Plastic Slate Roofing Co.*, 14 Minn. 49; *State v. Vt. Central R. Co.*, 28 Vt. 583; *Phelps v. People*, 72 N. Y. 334; Field on Corporations, § 384. The only pertinency of any allegation as to the corporate existence of the company, in this case, was to identify the party by whom the receipts were issued, the more particularly to describe the property alleged to have been stolen, and to show its value. The fact of incorporation was not an essential ingredient of the offence charged. If the receipts represented a legal liability against the company, so that they were valuable as property, and capable of becoming subjects of larceny under the statute, it is wholly immaterial how or where the company was incorporated, or whether in fact it had any legal existence as a corporation.

In respect to the second point, the want of any allegations showing that the railroad company, in fact, owned or operated a railroad in connection with its elevator, or that it had any power or authority under its charter to own and operate the elevator in question, or to do any of the other acts alleged to have been done by it, is not a fatal defect. Conceding the requisite power and authority of the company to receive wheat in storage for shipment, and to issue therefor warehouse receipts of the kind and character mentioned and described in the indictment, it is plain, upon the facts stated, that it incurred in the issuance of the receipts in question, a liability in respect to each of them, to any one who might become its lawful owner and holder, for a like quantity and quality of wheat represented by it, or its value. Gen. St. 1878, c. 124, §§ 7 to 16, inclusive. This liability it cannot escape or evade by pleading want of corporate power to make and execute the receipts. Having assumed the legal right to exercise the requisite authority, and reaped the benefits of the transaction done upon the faith of its existence, it would be estopped from setting up a want of authority as a defence in

any action brought upon the receipts, by any lawful owner and holder thereof. If the company can interpose no such defence against its liability upon the receipts, certainly a party who has feloniously obtained possession of them cannot be heard to assert it, in answer to an indictment for the theft.

The allegations in regard to the sale, transfer and delivery of the receipts to Prael & Dubinsson are sufficient upon the question of the ownership of the property, though the statute (Gen. St. 1878, c. 124, § 17) makes instruments of this character negotiable and transferable by endorsement and delivery. The title may be passed by a sale, transfer and delivery upon a valuable consideration, though not in the form of an endorsement. *Pease v. Rush*, 2 Minn. 89, (107.)

The district court was right in overruling the motion in arrest of judgment.

27	528
43	149
27	528
64	489

HARVEY GILLITT vs. M. O. W. TRUAX and another.

April 29, 1881.

Justice of Peace — Effect of Judgment. — The objection that a justice's judgment is larger than the complaint justifies cannot be made in a collateral action.

Same — Adjournment. — On the return-day of the summons the plaintiff appeared and filed his complaint. Defendant did not appear. *Held*, the justice did not lose jurisdiction by holding the case open until the second day thereafter to enable plaintiff to make his proofs.

Levy on Growing Grain. — Growing grain may be levied on at any period of its growth, whether the growth is going on below or above the surface of the soil.

Appeal by plaintiff from a judgment of the district court for Dakota county, *Crosby*, J., presiding, and from an order refusing a new trial.

L. Van Slyck, for appellant, cited *School District v. Thomp-*

son, 5 Minn. 221, (280,) and *Holgate v. Broome*, 8 Minn. 209, (243.)

D. T. Chamberlain, for respondent.

GILFILLAN, C. J. The questions raised in this case are upon the validity of a judgment rendered by a justice of the peace, and of a levy of the execution thereon upon growing grain. The objections to the judgment are that the complaint on which it was rendered does not justify so large a judgment; this, if true, was only error, not affecting the jurisdiction, and does not affect the judgment in a collateral action; also that, as shown by the justice's docket, on the return-day of the summons, April 11th, after the plaintiff had filed his complaint, defendant not appearing, the justice, to enable plaintiff to furnish proof of his claim, held the case open until April 13th, on which day plaintiff appeared and made his proofs, and that so holding the case open operated to oust the justice's jurisdiction. The defendant not appearing upon the filing of the complaint, the pleadings were closed, and, under the statute, the justice had authority to adjourn the case for one week. What he did, in effect, was to adjourn it for two days. The judgment was valid.

At the time of the levy, the grain levied on had sprouted, but had not grown so as to be visible above the ground. It is claimed that a levy cannot be made upon growing grain until it is visible above the ground, so that the officer may see and know what he is levying upon. The statute determines the question. Gen. St. 1878, c. 66, § 315, reads: "A levy may be made upon grain or grass, while growing, and upon any other unharvested crops; but no sale thereof shall be made, under such levy, until the same is ripe or fit to be harvested; and any levy thereon, by virtue of an execution issued by a justice of the peace, or any court of record, shall be continued beyond the return-day thereof, if necessary, and remain in life; and the execution thereof may be completed at any time within thirty days after such grain, grass, or

other unharvested crop is ripe, or fit to be harvested." This does not limit the right to levy to any period of growth; at any time while growing, from first to last, the grain is subject to levy, without regard to whether the growth is going on below or above the top of the soil. In the case of this grain the growth had commenced, and under the statute the levy might be made.

Order and judgment affirmed.

27	530
45	127
27	530
48	400

JOHN W. MOLM *vs.* ARA BARTON.

May 3, 1881.

Depositions—Secondary Evidence.—Objections to depositions considered, and *held* to have been properly overruled. Where a paper has been lost, in the absence of any circumstances tending to raise a suspicion of bad faith, or of the destruction of the same for a fraudulent purpose, secondary evidence of its contents is admissible.

Sale—Retention of Possession by Vendor—Evidence to rebut Presumption of Fraud.—The effect of a failure on the part of the vendee of personal property to take immediate possession of the same, and continue to hold it, is to raise a presumption that the sale is fraudulent and void as against the then creditors of the vendor. Gen. St. 1878, c. 41, § 15. It is competent for the vendee to overcome this presumption by proof of facts showing that the sale was in fact made in good faith, and without any intention to hinder or delay or defraud the vendor's creditors, and under the statute the questions of good or bad faith and fraudulent intent are questions of fact for a jury.

Attachment of Bulky Property—Manual Possession—Conversion.—Where it appears that, in executing a writ of attachment, an officer made a valid levy upon certain piles of cord-wood, by marking the different piles levied on, taking the same into his actual control and custody, so far as manual possession under the circumstances was practicable, by then leaving the same in the charge and custody of a third person to hold for him, and by also filing in the proper town-clerk's office a certified copy of the writ and return pursuant to statute, the officer exercises such dominion over the property, to the exclusion of the lawful owner of the same, (not being the defendant in the attachment,) as, being wrongful, constitutes a conversion as respects such owner.

Plaintiff brought this action in the district court for Rice county, to recover damages for the conversion of 22 piles of cord-wood, which had been levied on by defendant, as sheriff of that county, under a writ of attachment against one Tobias Oehler. The sheriff had made his levy by marking the piles and leaving them in custody of one Crandall, and filing, on the same day, a certified copy of his writ and return in the proper town-clerk's office. At the trial, before *Buckham, J.*, and a jury, the plaintiff, to prove title, introduced evidence of a sale of the wood to himself by Oehler, by bill of sale and upon a valuable consideration, some two months before the attachment. The loss of the bill of sale was shown, and proof made of its contents, and of the good faith of the transaction, as stated in the opinion. This proof was made, in part, by the depositions mentioned in the opinion, which were read in evidence under defendant's objection and exception. The plaintiff also proved the service of the proper affidavit on the sheriff before suit. The jury found for the plaintiff, a new trial was denied, and the defendant appealed.

John H. Case, for appellant.

Geo. N. Baxter, for respondent.

CORNELL, J. 1. Treating the objections made to the depositions on the motion to suppress as having been properly renewed at the time they were offered in evidence on the trial, (of which, however, the case, as settled, leaves it at least in doubt,) there was no substantial error committed in denying the motion, and in allowing them to be read in evidence. The stipulation under which the depositions were taken provided that they might be "taken before any notary public residing at or near Big Stone City." It appears upon the face of the depositions that one of the witnesses was a farmer residing in Grant county, in Dakota territory, and that the other resided in Big Stone City, in said county. The plain purpose of the above-quoted clause of the stipulation was to facilitate the taking of their depositions, by providing

that they might be taken before any notary public easily accessible to the witnesses by reason of his residence in their vicinity. It appears from the notarial certificate attached to the depositions that the officer who took them was a notary public of Grant county, in said territory; that in taking them, and in administering the oaths to the witnesses, he acted as such notary, and in pursuance of the stipulation. It will, therefore, be presumed that he was a resident of Grant county, if the fact of residence is at all material. He was a proper person to take the depositions under the stipulation.

Under the clauses of the stipulation expressly waiving, among other things, "any and all objections to said notary public, and any and all notices and prerequisite forms required by law or the rules of court for the taking of depositions, but reserving the right to object to the competency and admissibility of the interrogatories and cross-interrogatories, and to any of them, and to any of the answers, respectively, in like manner and upon the same grounds as if the witnesses were present and orally examined in open court upon the trial of the cause," it is evident the parties did not intend to reserve the right to object to the depositions upon any purely technical ground not in any way affecting some substantial right. All the objections made to the introduction of said depositions are of that character. The failure of the notary to state in his certificate the place where the depositions were taken is unimportant, as it appears they were taken in Grant county by a notary who was authorized to take them. It appears that they were correctly read over to the witnesses by the notary before being signed; and whether the answers were in fact written out by the notary, or some one else, under the circumstances is immaterial.

2. The loss of the bill of sale from Oehler to plaintiff was sufficiently shown to justify the court in receiving secondary evidence of its contents. It appears that the instrument was drawn up by one Hopkins; that it was executed by

Oehler, and delivered to Molm in his presence. In this, plaintiff, Oehler and Hopkins agree. Plaintiff testifies positively that he then left it with Hopkins for safe-keeping, and that he has never seen it since. Hopkins thinks plaintiff took it, but is not positive. Both plaintiff and Hopkins made diligent search for it among their papers, but were unable to find it, and both state that they have no knowledge where it is. There is nothing in the evidence tending to show that the loss occurred through any intentional fault on the part of the plaintiff or Hopkins. The case presented is one of an actual loss, unaccompanied by any circumstance tending to raise a suspicion of bad faith, or of a destruction of the instrument for any fraudulent purpose, and the usual rule applicable to such cases is to be applied here.

3. The execution and delivery of the bill of sale of the wood from Oehler to plaintiff was sufficient to pass the title to the property as between themselves, conceding that there was no actual change in its possession. The only effect of a failure on the part of the vendee to take immediate delivery and possession of the property, and to continue to hold it, was to raise a presumption that the sale was fraudulent and void as against the then creditors of the vendor. Gen. St. 1878, c. 41, § 15. This presumption it was competent for the plaintiff to overcome, by proof of facts showing to the satisfaction of the jury that the sale was in fact made in good faith, and without any intention to hinder, delay or defraud the vendor's creditors; and, under the statute, the question of good or bad faith, and of a fraudulent intent, is one of fact exclusively for the jury. Sections 15, 20. Their finding in this case was against the existence of any fraudulent intent, and we cannot say, upon a review of the whole evidence, that it was insufficient to sustain the finding.

4. It must be assumed, from the verdict of the jury, that in executing the writ of attachment the defendant made a valid levy upon the property in question, by marking the dif-

ferent piles of wood levied on, taking the same into his actual control and custody, so far as manual possession under the circumstances was practicable, by then leaving the same in the charge and custody of one Crandall, to hold for him, and by also filing in the proper town clerk's office a certified copy of the writ and return, pursuant to Gen. St. 1878, c. 66, § 151, subd. 3. This was an exercise of such dominion over the property, to the exclusion of the lawful owner, as, being wrongful, constituted a conversion.

Order affirmed.

INDEX.

ACCORD AND SATISFACTION.

An agreement that a debtor shall give his note with sureties for one-half the debt in full satisfaction, followed by the giving of such note, and payment thereof at maturity, *held* a good accord and satisfaction, and that a note afterwards given for the balance of the original debt was without consideration. *Mason v. Campbell*, 64.

An agreement for release of a mortgage on payment of a sum less than the mortgage debt, *held*, under the circumstances, not to be within the law of accord and satisfaction. *Lankton v. Stewart*, 346.

ACKNOWLEDGMENT.

Of general assignment of partnership property. *Williams v. Frost*, 255.

Of statutory submission to arbitration can be taken only by a justice of the peace. *Barney v. Flower*, 403.

ACTION.

For enticing away plaintiff's wife. *Huot v. Wise*, 68.

To redeem from tax sale, its scope and object. *Goodrich v. Florer*, 97.

Against sheriff; affidavit to be served. *Bailey v. Chandler*, 174.

To restrain the issue of railway aid bonds by a town. *Harrington v. Town of Plainville*, 224.

Objection that an action is brought without authority of plaintiff, how to be made. *Hall v. Southwick*, 234.

To enforce a mechanic's lien, how triable. *Sumner v. Jones*, 312.

To recover back part of the purchase price of real estate, the sale being within the statute of frauds, and the purchaser in default. *Sennett v. Shehan*, 328.

To recover the value of lumber sold and delivered at an agreed price under a contract which has been abandoned. *Robson v. Bohn*, 333.

For specific performance of an agreement to discharge a mortgage. *Lankton v. Stewart*, 346.

On notes given for part of the purchase price of a machine sold with warranty and a special agreement, where a former action on a note for part of the purchase-money has been successfully defended on the ground of a breach of the warranty. *Geiser Threshing Machine Co. v. Farmer*, 428.

ACTION—Continued.

Against a common school-district, on a contract of hiring, by an uncertificated school-teacher. *Ryan v. School-District No. 13*, 433.

Against personal representatives, on a judgment rendered after the death of the decedent, in an action brought against him in his lifetime. *Berkey v. Judd*, 475.

On a note given for purchase-money on a conditional sale of a chattel, which the vendor has retaken from the purchaser. *Minneapolis Harvester Works v. Hally*, 495.

ADMINISTRATOR. See **ESTATES OF DECEDENTS**.

ADULTERY. See **DIVORCE**, 299.

ALTERATION OF INSTRUMENTS. See **CRIMINAL LAW**, 315.

AMENDMENT.

Of complaint, in order to make new parties defendant. *Penfield v. Wheeler*, 358.

Of statement for confession of judgment. *Wells v. Giescke*, 478.
See **APPEAL**, 415.

ANIMALS.

Discovered trespassing on railroad track. Duty of company. *O'Connor v. Chicago, Mil. & St. Paul Ry. Co.*, 166.

Duty of railroad company and of adjoining land-owner in respect of the latter's domestic animals, the road not being fenced. *Schubert v. Minneapolis & St. Louis Ry. Co.*, 360.

ANSWER.

In action for conversion, held to sufficiently deny plaintiff's ownership. *Chandler v. De Graff*, 208.

Not the proper mode of objecting that the action is brought without plaintiff's authority. *Hall v. Southwick*, 234.

ANTENUPTIAL CONTRACT. See **HUSBAND AND WIFE**, 295.

APPEAL.

From district to supreme court, in proceedings to lay out an avenue around Lake Phalen, is given by Sp. Laws 1878, c. 150. *County of Ramsey v. Stees*, 14.

Lies from order setting aside a tax judgment on the ground of strict legal right, and not on a question of practice or discretion. *County of Chicago v. St. Paul & Duluth R. Co.*, 109.

Alleged errors in orders not affecting the merits disregarded. *Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co.*, 128.

Lies from an order denying a new trial after trial by the court or a referee. *Chittenden v. German-American Bank*, 143.

Pending an appeal from a judgment dismissing an action to enjoin the issuing of railway aid bonds, with costs to defendant, the bonds were issued. The court refused to dismiss the appeal, but reversed

APPEAL—Continued.

the judgment on the merits, holding the legislation under which the bonds were issued to be unconstitutional. *Harrington v. Town of Plainview*, 224.

On appeal from an order dissolving an injunction, the court will not stay proceedings by defendant not included in the injunction. *Bass v. City of Shakopee*, 250.

From order of town supervisors in a road matter. *Schruster v. Town of Lemond*, 253.

Lies from the "final decree" in a foreclosure suit; but on such appeal no error in the judgment directing the sale can be reviewed. Such errors are only reviewable on appeal from such judgment. *Dodge v. Allis*, 376.

A case, attached to the judgment-roll by stipulation of the attorneys, will be disregarded unless signed and allowed by the judge or referee. *Abrahams v. Sheehan*, 401.

An order allowing an amendment before trial cannot be reviewed on appeal from an order refusing a new trial. *City of Winona v. Minn. Ry. Construction Co.*, 415.

On appeal from an order refusing a new trial, the appellant, claiming that the court should have found in his favor on an issue not made in the pleadings, must make it clearly appear that such issue was in fact made and litigated at the trial. *Id.*

Appeals from justices' courts. See JUSTICE OF PEACE, 29, 236, 304, 332, 498. See CRIMINAL LAW, 521.

ARBITRATION.

A statutory submission must be and can only be acknowledged before a justice of the peace. The want of such an acknowledgment is fatal to the award, and a judgment thereon is erroneous and will be reversed, though the objection was not made on the application for judgment. *Barney v. Flower*, 403.

ASSESSMENTS FOR LOCAL IMPROVEMENTS. See CITY OF MINNEAPOLIS, 509; CITY OF ST. PAUL, 78, 442.

ASSIGNMENT.

Of judgment held good, notwithstanding clerical errors. *Willis v. Jelíneck*, 18.

Of a debt passes the title without notice to the debtor, who cannot thereafter be summoned as garnishee of the assignor in respect of such debt. *Williams v. Pomeroy*, 85.

Of a mortgage held not to operate as a satisfaction. *Hall v. Southwick*, 234.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Execution and acknowledgment by one member of a firm, held sufficient. *Williams v. Frost*, 255.

ATTACHMENT.

Return of sheriff is conclusive upon him and his personal representatives, when sued by the attaching creditor. *State v. Penner*, 269.

Of bulky property *held* sufficient, and to constitute a conversion. *Molm v. Barton*, 530.

See CHATTEL MORTGAGE, 32; EXECUTION, 81, 134, 528; EXEMPTION, 134, 507; HOMESTEAD.

BANK.

A draft on one partner for his personal debt being sent to a bank for collection and paid by the drawee with the cheque of the firm, the creditor is chargeable with knowledge that the payment was made with partnership funds. *Davis v. Smith*, 390.

See PRINCIPAL AND AGENT, 87.

BONA FIDE HOLDER. See CRIMINAL LAW, 521; NEGOTIABLE INSTRUMENT, 87.

BONA FIDE PURCHASER.

An abstract maker, whose business involves searches for delinquent taxes, is not therefore, when purchasing land, chargeable with knowing the name of the person who has paid taxes on such land. *Morton v. Leland*, 35.

When land is conveyed in fraud of creditors, the innocent mortgagee of the fraudulent grantee may, on discovering the fraud, lawfully buy in, for his own benefit, an outstanding paramount title. *Gjerness v. Mathews*, 320.

At sale on foreclosure by advertisement of a mortgage that had been paid, but not discharged of record. *Merchant v. Woods*, 396.

A vendor's lien does not prevail against a subsequent creditor of the vendee, without notice of the lien. *Dawson v. Girard Life Ins. Co.*, 411.

BOND.

An execution plaintiff gave a bond with surety to the officer holding the execution, conditioned to be void if the plaintiff should save the sheriff harmless from all damages and costs occasioned to him by the levy of the execution. The judgment debtor recovered damages against the sheriff for making the levy, and issued execution thereon, and then discharged the judgment in consideration of the assignment to him of the bond. *Held*, that the condition of the bond was broken, and the judgment debtor, as assignee, could sue upon it. *Hove v. Freidheim*, 294.

BURDEN OF PROOF.

In quo warranto. *State v. Sharp*, 38.

That the use of partnership funds by one partner, in payment of his personal debt, was with the consent of his copartners. *Davis v. Smith*, 390.

CASE.

Though stipulated by attorneys, will be disregarded unless signed by the judge or referee. *Abrahams v. Sheehan*, 401.

CAUSES OF ACTION.

The rule that a single cause of action cannot be split, applies where a defendant's damages for breach of contract are entire, and precludes him from setting up part of them in one suit and part in another. *Geiser Threshing Machine Co. v. Farmer*, 428.

CERTIFICATE.

Of redemption from mortgage sale is *prima facie* evidence of the fact of redemption, and of the truth of its recitals. *Willis v. Jelineck*, 18.

CERTIORARI.

Does not lie to common council or board of public works of St. Paul, to review an assessment. *State v. Board of Public Works*, 442.

CHARGE OF COURT.

Where the court errs in stating the evidence to the jury, the party excepting should specifically call attention to the error that it may be corrected. *O'Connor v. Chicago, Mil. & St. Paul Ry. Co.*, 166.

The judge in his charge may express his opinion on a question of fact. If a party fears undue influence from such expression, he may request an instruction that the jury is exclusive judge of the fact. *Ames v. Cannon River Mfg. Co.*, 245.

CHARITY.

A certain hospital *held* to be an institution of purely public charity. *County of Hennepin v. Brotherhood of Gethsemane*, 460.

Also a parochial school. *County of Hennepin v. Grace*, 503.

CHATTEL MORTGAGE.

Until foreclosure or sale the mortgagor has a right of redemption, which may be reached by garnishment. Whether it can be reached by levy on the goods in the rightful possession of the mortgagee, *quære*. *Becker v. Dunham*, 32.

In an action by the mortgagor for the attachment of chattels in the rightful possession of the mortgagee, the measure of damages is the value of the mortgagor's interest. *Id.*

An indictment for selling mortgaged chattels by the mortgagor, with intent to defraud, must show an intent to defraud the mortgagee. *State v. Ruhnke*, 309.

The right of the mortgagee, under a clause authorizing him to take possession in case he shall at any time deem himself insecure, is not to be impaired by subsequent legislation (as Laws 1879, c. 65, § 2,) forbidding him to exercise the right without just cause. *Boice v. Boice*, 371.

Evidence *held* sufficient to prove a chattel mortgage fraudulent as to creditors. *Solberg v. Peterson*, 431.

CHOSE IN ACTION. See ASSIGNMENT, 85.

CITIES. See MUNICIPAL CORPORATIONS; CITY OF MINNEAPOLIS; CITY OF ST. PAUL.

CITY OF MINNEAPOLIS.

Widening and straightening a street is a local improvement within Const., art. 9, § 1. *Cook v. Slocum*, 509.

Powers of common council in determining extent of benefits, ascertaining damages, etc. Report of commissioners *held* to show assessment of all property benefited. *Id.*

Where, in straightening a street, the land on one side is released from the public easement, that is a benefit to the tract to which such land belongs, and may be considered in assessing benefits. *Id.*

CITY OF ST. PAUL.

Power to make a re-assessment when the original assessment for a local improvement is declared void because the contract for the work was illegally let. *City of St. Paul v. Mullen*, 78.

An assessment may include necessary expenses, in addition to the cost of the work. *Id.*

Power of the city, by ordinance, to regulate hacks at railway stations, though standing on private property. Construction of ordinance. *City of St. Paul v. Smith*, 364.

Right of property-owner to object to the mode of making an assessment, and when the objections may be made. *State v. Board of Public Works*, 442.

Power of the board of public works, and effect of their decision, in making and confirming assessments. Neither their action nor that of the common council can be reviewed by *certiorari*. *Id.*

CLAIM AND DELIVERY. See REPLEVIN.

COLOR OF TITLE.

Defined. *Seigneuret v. Fahey*, 60.

One in possession under an instrument (in this case a tax-deed) which, on its face, does not appear to give him any title or right of possession, is not holding under color of title. *O'Mulcahy v. Florer*, 449.

See PUBLIC OFFICER, 292.

COMPLAINT.

Proof of a valid consideration, introduced without objection, cures any defect in the averment of consideration in the complaint. *Frank v. Irgens*, 43.

Requisites of complaint in suit to recover back money paid as part of the purchase-money on a parol contract for sale of land. *Sennett v. Shehan*, 328.

Before a plaintiff can have an order making a new party defendant and requiring him to appear and answer, the complaint must show (by amendment if necessary) a cause of action or ground for relief against such party. *Penfield v. Wheeler*, 358.

COMPLAINT—Continued.

In an action by a teacher against a common school-district, the complaint should show that plaintiff had a certificate of qualification. *Ryan v. School-District No. 13*, 433.

An averment that the school-district and the teacher "entered into an agreement in writing," shows compliance, by the district, with all statutory directions as to the mode of making the contract. *Id.*

CONDEMNATION OF LAND. See EMINENT DOMAIN.

CONDITION. See CONTRACT, 320, 328, 333, 415; PUBLIC LANDS, 1.

CONFESSION OF JUDGMENT. See JUDGMENT, 177, 478.

CONFUSION OF GOODS. See CONTRACT, 208.

CONSIDERATION.

Proof of valid consideration, without objection, cures any defect in the averment of consideration in the complaint. *Frank v. Irgens*, 43.

A written promise to pay money "for value received," (though not a promissory note,) shows a valid consideration. *Id.*

Failure of consideration of note given for purchase-money on a conditional sale, the machine sold having been retaken by the vendor. *Minneapolis Harvester Works v. Hally*, 495.

CONSTITUTION.

Officers of the executive department are not amenable to the courts, and cannot, even as to ministerial acts, be controlled by *mandamus* or injunction. *Western Railroad Co. v. De Graff*, 1.

A senior creditor's right to redeem from a mortgage sale, when once vested, cannot be divested without due process of law. *Willis v. Jelineck*, 18.

In art. 6, § 8, limiting the jurisdiction of justices of the peace, the "amount in controversy" does not include costs. *Watson v. Ward*, 29.

An act legalizing an existing road, *held* to be a public act, though published only among the special laws; and to be valid, though it required the owners of land on which the road was situated to present their claims for compensation to the county commissioners within sixty days from the passage of the act, or be barred of all claims therefor. *State v. Messenger*, 119.

The limitation in art. 9, § 14b, of municipal aid to railways, to ten per cent. of the assessed valuation of the municipality, *held* not exceeded. *Coe v. Caledonia & Miss. Ry. Co.*, 197.

Under art. 11, § 5, no class of persons but the electors of a town and the officers chosen by them can determine the action of the town on questions (such as the issuance of bonds in aid of a railway) involving local taxation. Laws 1877, c. 106, § 7 (Gen. St. 1878, c. 34, § 98) *held* invalid, because it assumes to vest this power in a majority of the resident tax-payers, whether electors or not. *Harrington v. Town of Plainview*, 224.

CONSTITUTION—Continued.

The title of Laws 1874, c. 67, sufficiently expresses its subject, within art. 4, § 27. *Hoffman v. Parsons*, 236.

The obligation of an antenuptial contract cannot be impaired, nor the rights of the parties thereunder affected, by subsequent legislation. *Desnoyer v. Jordan*, 295.

The right of a chattel mortgagee, under a clause authorizing him to take possession in case he shall at any time deem himself insecure, is not to be impaired by subsequent legislation (such as Laws 1879, c. 65, § 2,) forbidding him to exercise the right without just cause. *Boice v. Boice*, 371.

The Cottage Hospital of Minneapolis, held to be an institution of purely public charity within art. 9, § 3, exempting such institutions from taxation. *County of Hennepin v. Brotherhood of Gethsemane*, 460.

A parochial school held to be an institution of purely public charity, within art. 9, § 3, and as such exempt from taxation. *County of Hennepin v. Grace*, 503.

But a parsonage held not exempt. *Id.*

Construction of art. 4, § 9, forbidding members of the legislature to hold certain offices. *Barnum v. Gilman*, 466.

Widening and straightening a street is a local improvement, within art. 9, § 1, authorizing assessments for such improvements. *Cook v. Slocum*, 509.

CONTEMPT.

A municipal corporation is not capable of contempt in disobeying an injunction. The disobedience of the writ is the contempt of individuals, *e. g.* the officers of the corporation. *Bass v. City of Shakopee*, 250.

CONTINUANCE.

A motion for a new trial, on account of a refusal to postpone the trial, held properly denied. *Boice v. Boice*, 371.

CONTRACT.

Construction of Gen. St. 1878, c. 11, §§ 78–80, forbidding counties from incurring pecuniary liability beyond certain limits. Held, that an agreement, in a contract for the building of a jail, to issue county orders in payment therefor, was the incurring of a pecuniary liability. *Johnston v. County of Becker*, 64.

A promise to pay money "for value received," though it be not a promissory note, shows a valid consideration. *Frank v. Irgens*, 43.

A vote of aid to a railway by a town is a standing offer; but the company need not accept it, but may obtain another vote in lieu thereof. *Coe v. Caledonia & Miss. Ry. Co.*, 197.

Rights of parties to a certain subcontract for furnishing ties to contractors engaged in building two lines of railway considered, where the subcontractor (plaintiff) had delivered on one line less, but on both

CONTRACT—Continued.

lines together more, than required by the subcontract, the defendants had paid him from time to time generally on account, had, on final settlement, paid him in full for the number of ties called for by the subcontract, and given him an order for the excess of ties delivered, (which were mingled with the others,) and had themselves taken from the mass the number of ties they were entitled to, leaving enough to fill the order. *Held* (1) that the defendants, when sued for converting the ties included in the order given plaintiff, might show what became of the ties left by them for plaintiff—as that they were burned; (2) that it was immaterial that the railway company had paid defendants on estimates which included all the ties delivered by plaintiff; (3) that until plaintiff separated from the mass the ties included in the order, he had not title to any specific ties; and (4) that defendants had a right to take from the mass ties enough to fill the subcontract, if they left plaintiff enough on either or both lines to fill his order. *Chandler v. De Graff*, 208.

A certain contract to carry on a farm on shares *held* to be a contract of hiring, and not to make the person hired a part-owner of the crop. *Porter v. Chandler*, 301.

A contract right depending on conditions precedent cannot be enforced without showing performance of the conditions. *Gjerness v. Mathews*, 320.

The purchaser in a parol contract for sale of real estate cannot recover back a partial payment of the purchase-money, without averring and proving a readiness to pay the balance, and a refusal by the vendor to convey. *Sennett v. Shehan*, 328.

In a contract to deliver lumber, partly in cars, and partly at plaintiff's yard, at a certain rate per week, and at agreed prices, payment to be made in instalments at specified dates, the covenant to continue delivering after any such date is dependent on the payment of the instalment to be paid at that date. If that is refused, without excuse, the seller may treat the contract as abandoned, refuse further deliveries, and recover the market value of the lumber delivered. *Robson v. Bohn*, 333.

A request by the purchaser to suspend deliveries on cars till further notice, *held* to justify a suspension of all deliveries while the request was in force. *Id.*

If, at one of the dates for payment, the seller has delivered all the lumber then due, the purchaser is not excused from making the payment because the seller has also delivered other and inferior lumber. *Id.*

A party being entitled to receive certain bonds, (left in *escrow*.) on completion of a truss railway bridge within three years, must strictly perform the condition to entitle himself to the bonds. It

CONTRACT—Continued.

is not enough that he builds a different kind of bridge, though as good as or better than a truss bridge, or that he builds the truss bridge after the three years. *City of Winona v. Minn. Ry. Construction Co.*, 415.

And if such party, building such different kind of bridge, relies on the other party's acceptance of or acquiescence in it as satisfying the contract, he must plead and prove such acceptance, etc. *Id.*

Contract of sale with warranty and a special agreement to make the machine sold as good as warranted, *held* to be an entire contract; and that the buyer, after successfully defending an action on one of his notes given for the purchase-money on the ground of breach of warranty, could not, when sued on the other notes, plead in defence a breach of the special agreement and damages therefrom. *Geiser Threshing Machine Co. v. Farmer*, 428.

A contract by a common school-district to hire a teacher not having a certificate of qualification, is void. *Ryan v. School-District No. 13*, 433.

And a complaint by the teacher on such alleged contract should aver the having of the certificate. *Id.*

An averment that the school-district and the teacher "entered into an agreement in writing" shows compliance by the district with all statutory directions as to the mode of making it. *Id.*

An agreement purporting to be made between a school-district and a teacher, and signed by the director and treasurer in their own name and official designation, is properly executed. *Id.*

Where bids were invited for the hiring of state prison shops, grounds and convict labor, and a contract was prepared between the successful bidder and the prison authorities, *held* that the latter might require the insertion of conditions against subletting, etc., not specified in the advertisement for bids, and that the bidder, having refused to assent to these, could not have *mandamus* to compel the execution of a contract in accordance with his bid. *State v. Reed*, 458.

An agreement between the creditor and principal debtor, extending the time for payment, though made after the debt is due, discharges the surety. *Wheaton v. Wheeler*, 464.

The taking of the debtor's note, payable at a future day, is such an extension. *Id.*

A contract for building a bridge referred to specifications to be attached thereto. *Held*, that certain specifications were sufficiently identified as those intended by the contract. *Hooper v. Webb*, 485.

The terms "first party" and "second party" being used, the court is to determine to which party each term refers. But if the question is erroneously submitted to the jury, and they decide it right, the error is cured. *Id.*

CONTRACT—Continued.

A party agreeing to do work according to a certain plan, cannot abandon the contract merely because the plan is an improper one. *Id.*

The law designating five commissioners to make a contract for a work, only three of whom sign it, the contractor cannot abandon the contract because the other two did not sign it. *Id.*

Contractor *held* to have waived an omission or delay in making an estimate. *Id.*

Validity and effect of antenuptial contract. See **HUSBAND AND WIFE**, 295.

CONTRIBUTORY NEGLIGENCE. See **MUNICIPAL CORPORATION**, 243; **RAILWAY**, 111, 137, 162, 360, 367.

CONVERSION.

Answer *held* to sufficiently deny plaintiff's ownership. *Chandler v. De Graff*, 208.

Levy on cord-wood, *held* such as to constitute a conversion. *Molm v. Barton*, 530.

CONVEYANCE. See **DEED**.

COSTS.

In Const. art. 6, § 8, limiting justice's jurisdiction, the "amount in controversy" does not include costs. *Watson v. Ward*, 29.

Expense of copy of reporter's notes of trial, though not taxable as costs of appeal, may be taxed in the district court. *Pinney's Will*, 280.

On appeal from justices. See **JUSTICE OF THE PEACE**, 29.

COUNTERCLAIM.

For money, in an action to enforce a mechanic's lien, does not entitle defendant to a jury trial. *Sumner v. Jones*, 312.

COUNTIES AND COUNTY OFFICERS.

Salary of auditor, how to be computed. *County of Mower v. Williams*, 25.

Contracts by counties involving the incurring of a "pecuniary liability" in excess of that allowed by Gen. St. 1878, c. 11, §§ 78-80. Rate of taxation permitted, how estimated. *Johnston v. County of Becker*, 64.

COUNTY OF RAMSEY. See **DISTRICT COURT**, 236; **JUSTICE OF PEACE**, 236.

COURTS. See **DISTRICT COURT**; **JUSTICE OF PEACE**; **UNITED STATES COURTS**.

COVENANT. See **CONTRACTS**, 328, 333, 415.

CRIMINAL LAW.

While Gen. St. 1878, c. 13, § 65, makes it the duty of town supervisors to make complaint for obstructing highways, any person may make such complaint. *State v. Galvin*, 16.

"Previous chaste character," how to be pleaded in an indictment for seduction under promise of marriage. *State v. Gates*, 52.

CRIMINAL LAW—Continued.

Winnebago City being exempt from the general law, and the sale of liquor being under the exclusive control of the common council, no indictment under the general law will lie for selling liquor in that village. *State v. Wheeler*, 76.

Construction of Gen. St. 1878, c. 16, § 10. An indictment under the first and second sentences of the section, for selling liquor to a minor, need not allege previous notice to the defendant. *State v. Hyde*, 153.

An indictment for selling mortgaged chattels, with intent to defraud, must show an intent to defraud the mortgagee. *State v. Ruhnke*, 309.

The alteration of an instrument, to constitute forgery, under Gen. St. 1878, c. 96, § 1, must be such as to alter its legal effect—not a mere verbal alteration. *State v. Riebe*, 315.

"Accountable receipt," as used in that section, defined. *Id.*

An indictment for altering an accountable receipt for money, so as to give it the form of a promissory note, is not good unless it shows what was the obligation of the receipt. *Id.*

After a town has voted against license, under Gen. St. 1878, c. 16, § 1, an indictment may be found, under section 4, for selling in the town without license. *State v. Hanley*, 25 Minn. 429, distinguished. *State v. Funk*, 318.

Payment of a U. S. revenue tax as a retail liquor dealer is no defence to an indictment under the state law for selling without license. *Id.*

The statute as to pleading a private statute in an indictment by reference to its title and date of passage, does not apply to a case where, at common law, such statute need not have been pleaded. *State v. Loomis*, 521.

When a case is certified to the supreme court on a motion in arrest of judgment after verdict, that court cannot review a previous order overruling a demurrer to the indictment. *Id.*

What questions can be raised on a motion in arrest of judgment. *Id.*

An indictment for larceny of warehouse receipts issued by a railway company sustained, though not showing legal authority in the company to issue them; the facts showing that the company would be liable on the receipts to a *bona fide* holder, as against whom it would be estopped to assert its want of authority. *Id.*

DAMS.

A riparian owner may not set back the water upon an upper proprietor at the ordinary stage of water. Definition of "ordinary stage of water." *Ames v. Cannon River Mfg. Co.*, 245.

A judgment in a suit for setting back water by means of a dam, may require the dam to be cut down a specified amount from its height at the time of the trial, without specifying such height, and may direct the sheriff to cut it down. *Id.*

DAMAGES.

In an action by the mortgagor of chattels for a levy thereon while in the rightful possession of the mortgagee, the damages are limited to the value of the plaintiff's interest therein. *Becker v. Dunham*, 32.

One thousand eight hundred dollars *held* not excessive in an action for enticing away plaintiff's wife. *Huot v. Wise*, 68.

Nine hundred and seventy-five dollars *held* not excessive for an injury sustained by the starting of a train from which plaintiff was alighting. *Keller v. Sioux City & St. Paul R. Co.*, 178.

Exemplary damages may be recovered for a wrong, though it be also punishable as a crime. *Boetcher v. Staples*, 308.

As to setting up damages for breach of special agreement in a contract of sale, in an action on a note given for part of the purchase-money, where the defendant has successfully pleaded damages for breach of warranty in the same sale to defeat an action on a former note for part of the purchase money. See *Geiser Threshing Machine Co. v. Farmer*, 428.

Plaintiff, in an action for trespass on land, allowed to recover items of damage not pleaded, but which resulted naturally from the trespass, and were proved without objection. *Isaacson v. Minneapolis & St. Louis Ry. Co.*, 463.

DEATH OF PARTY. See **ESTATES OF DECEDENTS**, 475.

DEBTOR AND CREDITOR.

Agreement between debtor and creditor that the former shall give his note with sureties for one-half of the debt in full satisfaction. The note was given, and was paid at maturity. *Held*, a good accord and satisfaction, and that a subsequent note for the balance was without consideration. *Mason v. Campbell*, 54.

An assignment of a debt passes the title without notice to the debtor, who cannot thereafter be garnished as a debtor of the assignor. *Williams v. Pomeroy*, 85.

A conveyance of a homestead (though a gift) is not fraudulent as to creditors, nor voidable by them. *Morrison v. Abbott*, 116.

A valid agreement to extend the time of payment of a debt is a defence to an action for the debt during the period of such extension. *Lyman v. Rasmussen*, 384.

Payment of individual debt by a partner with funds of the firm. Creditor charged with notice of such use of the partnership funds. *Davis v. Smith*, 390.

Evidence *held* sufficient to prove a chattel mortgage fraudulent as to creditors. *Solberg v. Peterson*, 431.

Verdict sustaining a sale of goods, impeached for fraud on creditors, *held* properly set aside as against evidence. *Campbell v. Landberg*, 454.

DEBTOR AND CREDITOR—Continued.

An agreement for extension of time, though made after the debt is due, discharges a surety. The taking of the debtor's note payable at a future day is such an extension. *Wheaton v. Wheeler*, 464.

Presumption of fraud as to creditors arising from continued possession by vendor on a sale of chattels. *Molm v. Barton*, 530.

See ESTATES OF DECEDENTS; JUDGMENT, 177, 478.

DECEASED PERSONS (Estates of.) See ESTATES OF DECEDENTS.

DECEIT. See FRAUD, 81, 455.

DECLARATION. See EVIDENCE, 166, 178.

DEED.

Passes title if executed and delivered, though not witnessed or acknowledged. Proof that it was made and executed is proof that it was signed and sealed. *Morton v. Leland*, 35.

DEMAND.

Before suit for damages for a fraud. See FRAUD, 455.

DEPOSITION.

Technical objections as to the place of taking, and the authority of a notary to take, depositions taken under a stipulation, *held* properly overruled. *Molm v. Barton*, 530.

DESERTION. See DIVORCE, 330.

DEVISE.

Part of the description of devised real estate rejected as mistaken. *Butler v. First Presbyterian Church*, 355.

DISMISSAL.

Error in refusing to dismiss, *held* cured by subsequent evidence. *Deakin v. Chicago, Mil. & St. Paul Ry. Co.*, 303.

See APPEAL, 224.

DISTRICT COURT.

Special terms in Ramsey county are lawfully held pursuant to an order orally announced in open court on March 11, 1876, and reduced to writing and filed *nunc pro tunc* in December, 1879. *Hoffman v. Parsons*, 236.

May by consent hear appeals from justices on questions of law alone in any county in the district. *Chesterson v. Munson*, 498.

DIVORCE.

When the fact of divorce is sought to be proved by the record of a decree in another state, the decree may be questioned for want of jurisdiction apparent on the record. *Morey v. Morey*, 265.

As a ground for divorce, adultery includes illicit intercourse by a husband with an unmarried woman. *Pickett v. Pickett*, 299.

DIVORCE—Continued.

When the district court, in an action between husband and wife, adjudges that the former shall pay the latter a monthly allowance for her separate maintenance until further order, such judgment impliedly authorizes the wife to live apart from her husband, and her doing so is not an act of desertion entitling him to a divorce. *Weld v. Weld*, 330.

DOMESTIC ANIMALS. See **ANIMALS**.

DOMESTIC RELATIONS. See **HUSBAND AND WIFE**.

DOWER. See **HUSBAND AND WIFE**, 295.

EASEMENT.

Right of land-owner to the lateral support of the adjoining land in a public street, and to damages for the removal of such support in grading the street. *Dyer v. City of St. Paul*, 457.

EDUCATION. See **CONTRACT**, 433; **SCHOOLS**, 38.

EJECTMENT.

In ejectment it is enough for plaintiff to prove a regular chain of title from a grantor whom the answer admits to have once owned the premises in fee. *Horning v. Sweet*, 277.

ELECTION.

The ineligibility of the candidate having the highest number of votes does not entitle his nearest competitor to the office, the ineligibility not appearing on the face of the ballots. *Barnum v. Gilman*, 466.

EMINENT DOMAIN.

An appeal lies from the district to the supreme court in proceedings to lay out an avenue around Lake Phalen, under Sp. Laws 1878, c. 150. *County of Ramsey v. Stees*, 14.

An act legalizing an existing road held constitutional, though requiring the land-owners to institute proceedings to obtain compensation within 60 days from its passage, or be barred. *State v. Messenger*, 119.

Evidence of prices obtained for other land than that in question is not admissible. *Stinson v. Chicago, St. Paul, & Minn. Ry. Co.*, 284.

EQUITY. See **INJUNCTION**; **MECHANIC'S LIEN**; **MERGER**; **MORTGAGE**; **PARTIES**; **PRINCIPAL AND SURETY**; **RECEIVER**; **TAXES**, 97; **TRUST**; **VENDOR AND PURCHASER**.

ESTATES OF DECEDENTS.

Effect of a judgment of the U. S. circuit court for Minnesota for a claim against a decedent's estate previously disallowed by the commissioners, and by the district and the supreme court. *Ames v. Slater*, 70.

ESTATES OF DECEDENTS—Continued.

- State v. Ramsey Co. Probate Court*, 25 Minn 22, followed as to the liability of a decedent's real estate in the hands of heirs, devisees, etc., for payment of his debts. *Dawson v. Girard Life Ins. Co.*, 411.
- Enforcement of judgment against the estate of the defeated party to an action, who dies after verdict or decision, and his representatives are not substituted as defendants. *Berkey v. Judd*, 475.

ESTOPPEL.

- A railway company, having accepted a land grant, not allowed to object to the validity of the conditions attached to it. *Western Railroad Co. v. De Graff*, 1.
- Extent of estoppel of former judgment. *McClung v. Condit*, 45.
- Failure to claim exemption at the time of a levy, held not to preclude a subsequent assertion of the claim. *McAbe v. Thomson*, 134.
- A disclaimer of title to goods levied on, not influencing the action of the officer nor acted on by him, will not estop the debtor from afterwards asserting his title. *Id.*
- Sheriff and his representatives are concluded by his return to a writ of attachment. *State v. Penner*, 269.
- Of former judgment of district court reversing a judgment of a justice in an action of replevin on appeal on questions of law alone. *Terry v. Bailey*, 304.
- An admission made without fraudulent purpose, and involving no culpable negligence on the part of the one making it, cannot work an estoppel. *Sutton v. Wood*, 362.
- Findings on a former trial which have been set aside cannot be used as an estoppel at a second trial. *City of Winona v. Minn. Ry. Construction Co.*, 415.
- A judgment on the same issues, in an action between plaintiff and one through whom the defendant does not claim title, is not an estoppel as between plaintiff and defendant. *Id.*
- A judgment on a verdict of no cause of action, in a suit on one of several notes given for part of the purchase-money on a sale with warranty and a special agreement, the defence being founded on a breach of warranty, estops the purchaser, when sued on the other notes, from pleading a breach of the special agreement and damages arising therefrom. *Geiser Threshing Machine Co. v. Farmer*, 428.

EVIDENCE.

- Under plea of tender. *Pinney v. Jorgenson*, 26.
- On an issue as to the price agreed in an oral contract of hiring, it is immaterial that about the time of the hiring the plaintiff offered to work for another at the price which defendant contends was agreed on between him and plaintiff. *Roles v. Mintzer*, 31.
- In *quo warranto* proceedings under Gen. St. 1878, c. 63, § 1, the burden of proof is on respondent. *State v. Sharp*, 38.

EVIDENCE—Continued.

Proof of a valid consideration, introduced without objection, cures any defect in the averment of consideration in the complaint.

Frank v. Irgens, 43.

Proof by plaintiff of the value of horses and harness at the time of their delivery to defendant, *held* sufficient to sustain a finding that such was their value at a subsequent date. *Bennett v. Kniss*, 49.

Held to prove that defendant, who had put his infant son into a partnership, had made himself liable to third persons as a partner. *Miles v. Wann*, 56.

The fact of good faith in taking possession of land may be proved by the direct evidence of the person taking possession. *Seigneuret v. Fahey*, 60.

County treasurer's receipts are evidence to show by whom taxes on land have been paid. *Id.*

A wife cannot be a witness against her husband, (against his consent,) even in an action for enticing her away, where the defence is based on his ill-treatment of her. *Huot v. Wise*, 68.

A statement that evidence was "objected to same as above" indicates only those grounds of objection stated in the last preceding objection. *State v. Hyde*, 153.

An objection stating no grounds therefor amounts to nothing. *Id.*

Statements made by the engineer of a train to the conductor, immediately after killing horses on the track, *held* admissible as part of the *res gestæ*. Review of cases on this subject. *O'Connor v. Chicago, Mil. & St. Paul Ry. Co.*, 166.

A husband and wife travelling by rail together, and she being injured while stepping from the train, *held* that his statement as to how the accident occurred was not a part of the *res gestæ*. *Keller v. Sioux City & St Paul R. Co.*, 178.

Previous knowledge of the unsafe condition of a platform in a street, by a person injured thereby, though evidence of negligence is not conclusive. *Estelle v. Village of Lake Crystal*, 243.

Requisites of tax deed, to be *prima facie* evidence of title. *Sheehy v. Hinds*, 259; *O'Mulcahy v. Florer*, 449.

In ejectment it is enough for plaintiff to prove a regular chain of title from a grantor whom the answer admits to have once owned the premises in fee. *Horning v. Sweet*, 277.

An improper question *held* cured by an irresponsible answer, in itself proper evidence. *Pinney's Will*, 280.

On an issue as to mental capacity, a witness not an expert cannot give his opinion generally, but merely his opinion based on facts within his knowledge and stated by him. *Id.*

On such an issue the contents of an instrument executed but not read by the testator are not admissible. *Id.*

EVIDENCE—Continued.

But his business acts, contracts, entries in diary, and declarations oral or written, tending to show whether he comprehended daily occurrences in his business, at or about the time in question, are admissible. *Id.*

And when the alleged mental incapacity was solely by reason of gradual mental decay resulting from extreme old age, it is competent to show that after the time in question the testator had sufficient capacity. *Id.*

On such an issue the record of the probate court on an application to appoint a guardian for the testator is inadmissible. *Id.*

On such an issue a question calling for the opinion of the witness as to the testator's capacity to make an intelligent disposition of property by will, is not improper. *Id.*

Testimony given before the grand-jury can be disclosed only in the cases allowed in Gen. St. 1878, c. 107, § 41. *Id.*

In condemnation proceedings, evidence of prices obtained for other land than that in question is not admissible. *Stinson v. Chicago, St. Paul & Minn. Ry. Co.*, 284

In such cases the proper inquiry on the point of value is, "what is the value of the land for any purpose?" and not, "what is its value for railroad purposes?" *Id.*

On an issue as to the value of grain on a farm, it is proper to prove what is the usual and proper market for the grain. *Porter v. Chandler*, 301.

Application of the rule that the credibility of testimony is for the jury. *Sumner v. Jones*, 312.

Proof of performance of conditions precedent is essential to the enforcement of contract rights. *Gjerness v. Mathews*, 320.

A receipt on a note, "interest paid to November 29, 1876," may be contradicted or explained by parol, though it be proved that, at that date, a new note was given for the interest. *Sears v. Wempner*, 351.

Held insufficient to prove that a horse, found dead near a railway track, was killed by a passing train. *Jenicke v. Minn. & St. Louis Ry. Co.*, 359.

Held sufficient to sustain a finding that the salary of an agent had been paid out of the profits of the business managed by him. *Sheffield v. Mullin*, 374.

A contract requiring the construction of a truss railroad bridge across the Mississippi river at Winona, and the issue being whether the bridge constructed was such a bridge, and this issue depending on whether the part of the bridge which was not truss was over an island or a sand-bar, it is error to ask an expert witness whether the bridge in question was a truss railroad bridge across the Mississippi river at Winona. *City of Winona v. Minn. Ry. Construction Co.*, 415.

EVIDENCE—Continued.

Held sufficient to prove a chattel mortgage fraudulent as to creditors, and the value of the mortgaged goods as found. *Solberg v. Peterson*, 431.

Degree of understanding sufficient to make a person competent as a witness, within Gen. St. 1878, c. 73, § 9. *Cannady v. Lynch*, 435.

The competency of a witness, objected to as of unsound mind, is to be determined by the trial court when he is produced. The pleadings do not determine it. The court need not examine the witness as to fitness to testify, unless it see some indication of unsoundness. *Id.*

Application of rule requiring objections to evidence to be definitely stated. *Id.*

A witness, though not an expert, may be asked whether a person appeared well or ill, or acted like a sane or insane person, if he has observed the fact. *Id.*

Verdict sustaining the validity of a sale impeached for fraud on creditors, *held* properly set aside as against evidence. *Campbell v. Landberg*, 454.

Held sufficient to prove insolvency. *Sollund v. Johnson*, 455.

Held sufficient to identify specifications referred to in a contract. *Hooper v. Webb*, 485.

Technical objections to depositions taken under a stipulation, *held* properly overruled. *Molm v. Barton*, 530.

The loss of a paper being proved, and there being nothing to show bad faith or fraud, secondary evidence of its contents is admissible. *Id.*

The presumption of fraud arising from retention of possession by a vendor of chattels, may be overcome by proof of facts showing good faith and the absence of fraudulent intent. *Id.*

EXCEPTION.

To evidence. See **EVIDENCE**, 153, 435 ; to instructions, see **CHARGE OF COURT**, 166.

EXECUTION.

Judgment *held* not to have been satisfied by a levy on personalty previously assigned for benefit of creditors, the levy being released at the debtor's request. *Willis v. Jelineck*, 18.

Priority of execution liens *held* not affected by false representations made by an attorney for one of the creditors, by which he induced a deputy sheriff to receive and levy his execution at once, as it was the deputy's duty to do. *Albrecht v. Long*, 81.

A disclaimer of title by the debtor, not influencing the action of the officer, nor acted on by him or the plaintiff, will not estop the debtor from afterwards asserting his title. *McAfee v. Thompson*, 134.

EXECUTION—Continued.

A sale of the fee of lands on execution against one having only an equitable interest under a contract of purchase, *held* void as against the vendor holding the legal title, and having a lien for the unpaid purchase-money. *Smith v. Lytle*, 184.

Growing grain may be levied on at any period of its growth, whether the growth be going on above or below the surface of the soil. *Gillitt v. Truax*, 528.

As to exemptions. See **EXEMPTION**, 134, 507; **HOMESTEAD**.

See **ATTACHMENT**.

EXEMPTION.

Unfinished burial cases *held* exempt as part of an undertaker's stock in trade. *McCabe v. Thompson*, 134.

Failure to claim exemption at the time of the levy, *held* not to preclude subsequent assertion of the claim. *Id.*

A "buggy" used only for pleasure, *held* not exempt. *Dingman v. Raymond*, 507.

From taxation. See **TAXES**, 460, 503.

See **HOMESTEAD**.

EXPERT. See **EVIDENCE**, 280, 415, 435.

FEME COVERT. See **HUSBAND AND WIFE**.

FENCE. See **RAILWAY**, 111, 360.

FINDINGS OF COURT. See **ESTOPPEL**, 415.

FORECLOSURE. See **MORTGAGE**, 175, 376, 396.

FOREIGN JUDGMENT. See **JUDGMENT**.

FORGERY. See **CRIMINAL LAW**, 315.

FORMER JUDGMENT. See **ESTOPPEL**, 45, 304, 415.

FRAUD.

The priority of execution liens *held* not affected by false representations made by an attorney for one of the creditors whereby he induced a deputy sheriff to receive and levy his execution at once, which it was the deputy's duty to do. *Albrecht v. Long*, 81.

By fraudulent contrivance of defendant, the plaintiff was induced to surrender a joint obligation of defendant and one J. for the several obligation of J., whom defendant falsely represented to be solvent, though he knew the contrary. *Held*, that no demand was necessary before suit. *Sollund v. Johnson*, 455.

See **FRAUDULENT CONVEYANCES**.

FRAUDULENT CONVEYANCES.

A conveyance of a homestead (though by gift) is not fraudulent as to creditors, nor voidable by them. *Morrison v. Abbott*, 116.

FRAUDULENT CONVEYANCES—Continued.

- A sale of a homestead, even with fraudulent intent, does not make it liable to forced sale on execution. *Ferguson v. Kumler*, 156.
- Evidence *held* sufficient to prove a chattel mortgage fraudulent as to creditors. *Solberg v. Peterson*, 431.
- A verdict sustaining a sale impeached for fraud on creditors, set aside as against evidence. *Campbell v. Landberg*, 454.
- Presumption of fraud arising from retention of possession by a vendor of chattels, how overcome. The question of good or bad faith and of fraudulent intent is for the jury. *Molm v. Barton*, 530.

GARNISHMENT.

- Until foreclosure or sale the mortgagor of chattels has a right of redemption, which may be reached by garnishment. *Becker v. Dunham*, 32.
- Where a claimant is treated by the court and parties as a party to the end of the proceedings, it is too late then to object that he was not made such by special order. *Williams v. Pomeroy*, 85.
- Motion for judgment before close of disclosure, *held* properly denied. *Id.*
- An assignment of a debt passes the title without notice to the debtor, who cannot thereafter be garnished therefor by a creditor of the assignor. *Id.*

GRAND JURY. See EVIDENCE, 230.

HIGHWAY.

- Complaint for obstructing. See CRIMINAL LAW, 16. See EMINENT DOMAIN, 119; MUNICIPAL CORPORATION, 243, 457; PUBLIC OFFICER, 90; ROAD, 253.

HOMESTEAD.

- A conveyance of a homestead, though a gift, is not voidable by creditors. *Morrison v. Abbott*, 116.
- A sale of a homestead, even with fraudulent intent, does not make it liable to forced sale on execution. *Ferguson v. Kumler*, 156.
- Where a homestead actually occupied exceeds the statutory limit, this does not make the whole tract liable to levy. *Id.*
- May consist of an undivided interest in land. *Kaser v. Haas*, 406.
- And, in such case, the purchase, by the occupant, of the outstanding undivided interest, does not make the interest so purchased subject to the lien of a judgment against the purchaser prior to his purchase and while his homestead right existed. *Id.*

HUSBAND AND WIFE.

- A recovery may be had against one in an action against several for enticing away plaintiff's wife, though no cause of action be proved against the others. *Huot v. Wise*, 68.

HUSBAND AND WIFE—Continued.

A wife cannot be a witness against her husband, (without his consent,) even in such an action, and where the defence is based on his ill-treatment of her. *Id.*

A husband and wife travelling together, and she being injured, his statement as to how the injury occurred held not part of the *res gestæ*. *Keller v. Sioux City & St. Paul R. Co.*, 178.

Parties in view of marriage may by contract fix the rights which each shall have in the estate of the other, or which the survivor shall have in the other's property after his or her decease, and exclude the operation of the law fixing such rights. Gen. St. 1866, c. 48, §§ 14-17, did not limit such contracts to merely barring dower. *Desnoyer v. Jordan*, 295.

The obligation of such a contract cannot be impaired, nor the rights of the parties thereunder affected, by subsequent legislation. *Id.*

- A wife living apart from her husband, under a judgment requiring him to pay her a monthly allowance for her separate maintenance, is not guilty of desertion. *Weld v. Weld*, 330.

See DIVORCE 265, 299.

ILLEGAL CONTRACT. See CONTRACT, 433; NEGOTIABLE INSTRUMENT, 440.

INDEMNITY. See BOND, 294.

INDICTMENT. See CRIMINAL LAW, 52, 76, 153, 309, 315, 318, 521.

INFANT. See CRIMINAL LAW, 153.

INJUNCTION.

Will not issue to restrain officers of the executive department, even in the performance of ministerial acts. *Western Railroad Co. v. De Graff*, 1.

A statute authorizing two modes—one valid and the other invalid—whereby town officers may be empowered to issue negotiable railway aid bonds, if the invalid mode only be pursued, the issue of the bonds may be restrained by injunction. *Harrington v. Town of Plainview*, 224.

A municipal corporation is not capable of contempt in disobeying an injunction. The disobedience of the writ is the contempt of individual persons, *e. g.*, the officers of the corporation. *Bass v. City of Shakopee*, 250.

Held properly dissolved, where it operated to stop an important public work, and the injury occasioned to plaintiff was but slight. *Id.*

See APPEAL, 250.

INSOLVENCY. See EVIDENCE, 455.

INSURANCE (FIRE.)

The defendant company *held* chargeable with knowledge of and consent to other concurrent insurance obtained from other companies through the same person who acted as defendant's agent in making its insurance, and *held* to have waived the condition requiring an endorsement of such consent on the policy. *Brandup v. St. Paul F. & M. Ins. Co.*, 393.

INSURANCE (LIFE.)

A father who takes a paid-up policy on his own life, payable to his children, cannot surrender it and take a new policy payable to other persons. *Ricker v. Charter Oak Life Ins. Co.*, 193.

Where a by-law provides that proof of death shall be made on blanks to be furnished by the society, and with the seal of a lodge, and the secretary of the society refuses to furnish a blank, proof of death may be made without it, and without the seal of a lodge. *Gellatly v. Odd Fellows Mut. Benefit Society*, 215.

INTEREST.

Usury, when a defence to negotiable paper. *First Nat. Bank v. Bentley*, 87.

Under Gen. St. 1866, c. 23, § 1, excessive interest, if voluntarily paid, cannot be recovered back. *Cornell v. Smith*, 132.

See PRINCIPAL AND AGENT, 87.

INTOXICATING LIQUOR. See CRIMINAL LAW, 76, 153, 318.

JOINDER OF PARTIES. See PARTIES TO ACTIONS.

JUDGMENT.

Assignment of judgment *held* good notwithstanding clerical errors. *Willis v. Jelineck*, 18.

One having a judgment lien against one of the heirs of a deceased intestate mortgagor, may redeem from a mortgage sale. *Id.*

Held not satisfied by a levy on personalty previously assigned for the benefit of creditors, the levy being released at the debtor's request. *Id.*

Extent of estoppel of former judgment. *McClung v. Condit*, 45.

In an action against three as partners, the plaintiff, failing to prove the partnership as to one defendant, may dismiss as to him, and have judgment against the other two. *Miles v. Wann*, 56.

Effect of judgment in the U. S. circuit court for Minnesota for a claim against a decedent which had been previously disallowed by the commissioners, and by the district and the supreme court. *Ames v. Slater*, 70.

A tax judgment rendered against land exempt from taxation is not void for want of jurisdiction. *County of Chisago v. St. Paul & Duluth R. Co.*, 109.

JUDGMENT—Continued.

Statement for judgment by confession, *held* sufficient. *Cleveland Co-operative Store Co. v. Douglas*, 177.

Directing the cutting down of a dam, *held* sufficiently specific. *Ames v. Cannon River Manuf'g Co.*, 245.

May be ordered and entered in accordance with special findings, though there be no general verdict. *Birby v. Wilkinson*, 262.

Of divorce, rendered in another state, may be attacked collaterally for want of jurisdiction apparent on the record. *Morey v. Morey*, 265.

Where a judgment record specifies particularly the mode of service of process on defendant, it will not be presumed, in aid of the record, that there was any other or different service. *Id.*

On appeal from a justice of the peace, on questions of law alone, a simple judgment of reversal merely operates as a dismissal of the action without prejudice. *Terryll v. Bailey*, 304.

The action being in replevin, such a judgment is not pleadable in bar to a second action of replevin for the same property, unless the answer alleges that the judgment of reversal was rendered on the merits. The judgment alone does not show it. *Id.*

Receiver of specific property, *held* to be fully protected by the order appointing him, though afterwards reversed because the property was exempt. *Holcombe v. Johnson*, 353.

The "final decree" in a foreclosure suit is appealable; but errors in the judgment directing a sale can only be reviewed by appeal from that judgment. *Dodge v. Allis*, 376.

As to the vesting of title by such "final decree." *Id.*

A judgment on the same issues in an action between plaintiff and one through whom defendant does not claim title, is not an estoppel as between plaintiff and defendant. *City of Winona v. Minn. Ry. Construction Co.*, 415.

For defendant in a suit on one of several notes given for a machine sold with warranty and a special agreement, the defence being a breach of the warranty, estops the purchaser from setting up a breach of the special agreement, when sued upon another of the notes. *Gesser Threshing Machine Co. v. Farmer*, 428.

How to be enforced against the estate of a defendant who has died after verdict and before judgment, and whose executors have not been substituted as defendants. *Berkey v. Judd*, 475.

Proper mode of entering judgment by confession. The consideration and its character, and not merely the evidence of the debt made by the parties, should be shown in the statement. *Wells v. Giesecke*, 478.

A statement for two or more distinct liabilities, where there is no intent to defraud, may be vacated as to one and sustained as to the rest. *Id.*

JUDGMENT—Continued.

An insufficient statement cannot be amended by the court *nunc pro tunc*, to the prejudice of intermediate lien creditors. *Id.*

The judgment of a justice cannot be collaterally attacked because larger than the complaint justifies. *Gillitt v. Truax*, 528.

JUDGMENT ROLL. See **CASE**, 401.

JURISDICTION.

Officers of executive department are not amenable to the courts. *Western Railroad Co. v. De Graff*, 1.

The court has jurisdiction to render a tax judgment against land, though it be exempt from taxation. *County of Chisago v. St. Paul & Duluth R. Co.*, 109.

Statutes authorizing service by publication must be strictly pursued to give jurisdiction. *Morey v. Morey*, 265.

A judgment on an award under the statute, where the submission was not properly acknowledged, though erroneous, is not void for want of jurisdiction. *Barney v. Flower*, 403.

Of district court to hear appeals from justices in any county. *Ohester-son v. Munson*, 498.

See **DIVORCE**, 265; **JUDGMENT**, 265; **JUSTICE OF PEACE**, 29, 236, 528.

JURY.

Verdict cannot be impeached by affidavits of jurors showing mistake. *Stevens v. Montgomery*, 108.

Judgment on special findings, with no general verdict. *Bisby v. Wilkinson*, 262.

Application of rule that credibility of testimony is for the jury. *Sumner v. Jones*, 312.

Trial by jury is not a matter of right in a suit to enforce a mechanic's lien. *Id.*

Contributory negligence of a land-owner, whose cattle are killed on an unfenced railway, is a question for the jury. *Schubert v. Minn. & St. Louis Ry. Co.*, 360.

Good faith in a sale, where the vendor retains possession, is a question for the jury. *Mohm v. Barton*, 530.

JUSTICE OF PEACE.

The "amount in controversy" in the constitutional limitation of justices' jurisdiction, does not include costs. *Watson v. Ward*, 29.

On appeal on questions of law alone, the district court may modify the judgment by correcting the erroneous part of it, if separable from the rest. *Id.*

The appealing defendant failing to reduce the recovery in the justice's court by one-half or more, the plaintiff has costs and disbursements in the district court. *Id.*

JUSTICE OF PEACE—Continued.

A justice of a town in Ramsey county may, within his own town, issue a summons and take proceedings for unlawful detainer of real estate in St. Paul. *Hoffman v. Parsons*, 236.

Appeals in such cases may be tried at the regular special terms of the district court. *Id.*

On appeal on questions of law alone, a simple judgment of reversal merely operates as a dismissal without prejudice to a new action. *Terryll v. Bailey*, 304.

On such appeal, a judgment of reversal of the justice's judgment for plaintiff in replevin entitles defendant to a return of the property or its value, but is not pleadable in bar to a second action of replevin for the same property, without an averment that the reversal was on the merits. The judgment alone does not show that. *Id.*

A notice of appeal from a justice's judgment, which wholly fails to show by what justice or in what county it was rendered, is a nullity. *Pettingill v. Donnelly*, 332.

Is the officer before whom a statutory submission to arbitration must be acknowledged. *Barney v. Flower*, 403.

An appeal on questions of law alone may, by consent, be heard in any county in the district; and appearing and arguing the appeal, without objecting that the hearing is in the wrong county, is a waiver of the objection. *Chesterson v. Munson*, 498.

Such an appeal may be placed on the calendar and moved for argument at the next term after the return is filed, though 30 days have not elapsed since the trial before the justice. *Id.*

A defective complaint *held* to be cured by verdict. *Id.*

A justice's judgment cannot be collaterally attacked because larger than the complaint justifies. *Gillitt v. Truax*, 528.

The complaint being filed on the return-day of the summons, and the defendant not appearing, the justice does not lose jurisdiction by holding the case open two days for the plaintiff to make his proofs. *Id.*

LACHES.

As a reason for refusing a new trial for surprise or newly-discovered evidence, etc. See NEW TRIAL, 357, 519.

LARCENY. See CRIMINAL LAW, 521.

LEVY.

On chattel mortgagor's right of redemption. *Becker v. Dunham*, 32.
See ATTACHMENT; EXECUTION; EXEMPTION.

LIEN.

Requisites of notes given for sowing-seed, under Gen. St. 1878, c. 39, §§ 21, 22, in order to the statutory lien on the crop. *Kelly v. Seely*, 335.

LIEN—Continued.

See EXECUTION, 81; JUDGMENT, 18; MECHANIC'S LIEN; MORTGAGE, 18; PARTIES TO ACTIONS, 184; TAXES, 92; VENDOR AND PURCHASER, 411.

LIMITATIONS (STATUTE OF.) See TAXES, 259, 449.

MANDAMUS. See CONSTITUTION, 1; PUBLIC OFFICER, 90.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

On an issue as to the agreed price in an oral contract of hiring, it is immaterial that, about the time of the hiring, plaintiff offered to work for another at the price which defendant contends was agreed on between him and plaintiff. *Roles v. Mintzer*, 31.

A certain contract to carry on a farm on shares, construed to be a contract of hiring, and not to make the person hired a part-owner of the crop. *Porter v. Chandler*, 301.

See RAILWAY, 137, 162, 367.

MEASURE OF DAMAGES. See DAMAGES.

MECHANIC'S LIEN.

Defendant is not entitled to a jury trial, though his answer pleads no cause of action in plaintiff, and a counterclaim for a balance due to himself. *Sumner v. Jones*, 312.

Continues to attach to the land, though the building be burned before the "account" is filed. *Freeman v. Carson*, 516.

MERGER.

Does not take place where it is clearly for the interest of the holder of the legal and equitable estate that they should be kept separate. *Smith v. Lytle*, 184.

MINNEAPOLIS. See CITY OF MINNEAPOLIS.

MINOR. See CRIMINAL LAW, 153.

MISTAKE.

In assignment of judgment. *Willis v. Jolineck*, 18.

In description of property devised. *Buller v. First Presbyterian Church*, 355.

MONEY HAD AND RECEIVED. See INTEREST, 132; VENDOR AND PURCHASER, 328.

MORTGAGE.

A senior creditor's right to redeem, under Gen. St. 1866, c. 81, § 16, when once vested, cannot be divested without due process of law. *Willis v. Jolineck*, 18.

One having a judgment lien against one of the heirs of a deceased intestate mortgagor, may redeem from the mortgage sale. *Id.*

MORTGAGE—Continued.

- A lien on an undivided interest in land is a lien "on some part thereof," within Gen. St. 1866, c. 81, § 16. *Id.*
- A notice of intention to redeem, left with the register of deeds, and by him recorded and indexed, is "filed" in his office, within Gen. St. 1866, c. 81, § 16. *Id.*
- A redemption allowed to be made from a sheriff, under Gen. St. 1866, c. 81, § 16, may be made from a deputy in charge of his office. *Id.*
- A certificate in conformity with Gen. St. 1866, c. 81, § 15, is *prima facie* evidence of the fact of redemption and of the truth of its recitals. *Id.*
- A mortgage by one partner of partnership real estate standing in his name as owner, to raise money to pay firm debts, *held* within such partner's implied authority, and binding on the firm. *Chittenden v. German-American Bank*, 143.
- A foreclosure sale for an instalment of the mortgage debt exhausts the mortgage lien on the land sold; but a redemption by the mortgagor annuls the sale, and restores the lien of the mortgage for the other instalments. *Standish v. Vosberg*, 175.
- Certain assignments of a mortgage *held* not to amount to a satisfaction. *Hall v. Southwick*, 234.
- Where land is conveyed in fraud of creditors, an innocent mortgagee from the fraudulent grantee may, on discovery of the fraud, lawfully buy in, for his own benefit, an outstanding paramount title. *Gjerness v. Mathews*, 320.
- An agreement between the vendor and purchaser of land, and the holder of a mortgage thereon, that the latter will release the mortgage on payment, in instalments from time to time, before maturity, of a sum less than the mortgage debt, is not affected by the law of accord and satisfaction, and the purchaser may compel a specific performance of the mortgagee's agreement. *Lankton v. Stewart*, 346.
- An appeal may be taken from the "final decree" in a foreclosure suit; but on such appeal no error in the judgment directing the sale can be reviewed. Such errors are reviewable only on appeal from that judgment. *Dodge v. Allis*, 376.
- When application for such final decree is made by the purchaser at the sale, or his assigns, such decree may vest title in any person the applicant may name; and when, on such application, the title is vested by the decree in the mortgagor defendant, the court will not presume an assignment from the purchaser to the mortgagor such as would operate as a redemption. *Id.*
- Foreclosure by advertisement of a mortgage which had been in fact paid but not discharged of record, *held* to vest a good title in the purchaser at the sale, who paid value without notice of the payment. *Merchant v. Woods*, 396.

MORTGAGE OF PERSONAL PROPERTY. See **CHATTEL MORTGAGE.**

MOTIONS AND ORDERS.

The objection that an action is brought without plaintiff's authority must be made by motion and not by answer. *Hall v. Southwick*, 234.

See **GARNISHMENT**, 85; **RECEIVER**, 353.

MUNICIPAL AID TO RAILWAYS. See **MUNICIPAL CORPORATION**, 197, 224, 490.

MUNICIPAL BONDS. See **MUNICIPAL CORPORATION**, 197, 224, 490.

MUNICIPAL CORPORATION.

There is nothing in Sp. Laws 1875, c. 132, which prevents the holding of more than one election on the question of railway aid, or more than one issue of bonds. *Coe v. Caledonia & Miss. Ry. Co.*, 197; *Hoyt v. Braden*, 490.

Const. art. 9, § 14b, limiting aid to railways to 10 per cent. of the valuation of the municipality, held not exceeded. *Coe v. Caledonia & Miss. Ry. Co.*, 197.

A vote of aid is a standing offer, but the railway company need not accept it, but may obtain another vote in lieu thereof. *Id.*

A notice posted on May 13, for a meeting on May 23, is posted "at least 10 days prior" to such meeting. *Id.*

In voting aid for a railway, the voters may impose such conditions as they please, not forbidden by statute, nor contrary to public policy; e. g., a condition as to the location of the station in the town. *Id.* *Hoyt v. Braden*, 490.

In a suit to enjoin the issuance of municipal railway aid bonds, the defendant had judgment refusing the injunction, and for costs. Pending the plaintiff's appeal, the bonds were issued. The court refused to dismiss the appeal, and reversed the judgment on the merits, holding the legislation under which the bonds were issued to be unconstitutional. *Harrington v. Town of Plainview*, 224.

A statute authorizing two modes, one valid and one invalid, whereby town officers may be empowered to issue negotiable railway aid bonds, if the invalid mode only be pursued, the issue of the bonds may be restrained by injunction. *Id.*

No class of persons but the electors of towns and the officers chosen by them can determine the action of the town on questions (such as the issuance of railway aid bonds) involving local taxation. *Id.*

Laws 1877, c. 106, § 7, (Gen. St. 1878, c. 34, § 98,) held unconstitutional because it assumes to vest this power in a majority of resident taxpayers, whether electors or not. *Id.*

Is bound to see that a platform which it permits a private person to construct in a public street, and which is used as part of the street, is in a safe condition, though it be not in the most usually travelled part of the street. *Estelle v. Village of Lake Crystal*, 243.

MUNICIPAL CORPORATION—Continued.

Previous knowledge, by a person injured, of the unsafe character of such platform for want of a railing, though evidence of negligence, is not conclusive. *Id.*

Is not capable of contempt in disobeying an injunction. The disobedience is the contempt of individuals, *e. g.*, the officers of the corporation. *Bass v. City of Shakopee*, 250.

Power of city, by ordinance, to regulate hacks at railway stations, though standing on private property. Construction of ordinance of St. Paul. *City of St. Paul v. Smith*, 364.

A land-owner is entitled to the lateral support of the adjoining land in a public street, and to damages for the removal of such support in grading the street. *Dyer v. City of St. Paul*, 457.

In voting town bonds to a railway, under Sp. Laws 1875, c. 132, which requires the bonds voted to be "payable in not less than 10 nor more than 20 years," the voters may impose a condition that the bonds shall be payable at a place named, and on or before the expiration of 20 years, at the option of the town. *Hoyt v. Braden*, 490.

As to assessments for local improvements, and the powers of city officers in respect thereto. See CITY OF MINNEAPOLIS; CITY OF ST. PAUL.

NEGLECTIGENCE.

Village held liable for suffering a platform, erected in a street by a private person, to be in an unsafe condition. *Estelle v. Village of Lake Crystal*, 243.

Person injured thereby held not guilty of contributory negligence. *Id.* See RAILWAY, 111, 137, 162, 166, 360, 367.

NEGOTIABLE INSTRUMENT.

Where a note, besides promising a sum stated, also contains a promise to pay an additional sum for expenses in case it is sued, this additional sum cannot be recovered if the amount due on the note was tendered before suit brought, though the tender was not kept good, there having been no subsequent demand. *Pinney v. Jorgenson*, 26.

Effect of promise "for value received" in an instrument which is not a promissory note. *Frank v. Irgens*, 43.

A note given for the balance of a debt, after endorsed notes for part had been accepted in satisfaction of the whole, held without consideration. *Mason v. Campbell*, 54.

The customer of a bank held not to have been its agent in procuring the usurious renewal of a note. *First Nat. Bank v. Bentley*, 87.

Usury, when a defence to negotiable paper. *Id.*

An endorsee before maturity, without notice, as security for a precedent debt, is a holder for value if he surrenders other securities in consideration of the endorsement. *Id.*

NEGOTIABLE INSTRUMENT—Continued.

- A note otherwise negotiable is not so, if it contains a stipulation for reasonable attorney's fees if sued on. *Jones v. Radatz*, 240.
- A receipt on a note, "interest paid to Nov. 29, 1876," may be contradicted or explained by parol, though it be proved that at that date a new note was given for the interest. *Sears v. Wempner*, 351.
- Requisites of a note given for sowing-seed, to secure a lien on the crop, under Gen. St. 1878, c. 39, §§ 21, 22. *Kelly v. Seely*, 385.
- A note for goods previously bought at a sale by an unlicensed auctioneer, and delivered to the purchaser, *held* valid. *Gunnaldson v. Nyhus*, 440.
- The title to warehouse receipts, which the statute makes negotiable by endorsement, may be passed by sale and delivery without endorsement. *State v. Loomis*, 521.
- As to municipal railway and bonds, see **MUNICIPAL CORPORATIONS**, 197, 224, 490.

NEWLY-DISCOVERED EVIDENCE. See **NEW TRIAL**, 519.**NEW TRIAL.**

- Will not be granted for erroneous admission of evidence, there being manifestly no prejudice to the party objecting. *Huot v. McGovern*, 84.
- Verdict cannot be impeached by affidavit of jurors showing mistake. *Stevens v. Montgomery*, 108.
- After trial by the court without a jury, or by a referee, a motion for a new trial may be made, and an appeal taken from the order made thereon. *Chittenden v. German-American Bank*, 143.
- Asked for on the ground of surprise, *held* properly refused. *Feltus v. Balch*, 357.
- Asked for because of the refusal of a postponement, *held* properly refused. *Boice v. Boice*, 371.
- Asked for on the ground of an erroneous finding on an issue not made by the pleadings, *held* properly denied, it not appearing that such issue was in fact litigated at the trial. *City of Winona v. Minn. Ry. Construction Co.*, 415.
- Affidavits for a new trial for newly-discovered evidence, *held* insufficient because not showing proper diligence. *Fenno v. Chapin*, 519.

NOTE. See **NEGOTIABLE INSTRUMENT**.**NOTICE**

- To sheriff by claimant of property before suit. *Bailey v. Chandler*, 174.
- Of town election *held* to have been given "at least 10 days prior" thereto. *Coe v. Caledonia & Miss. Ry. Co.*, 197.
- Of use of partnership funds by a partner in paying his individual debt. *Davis v. Smith*, 390.

See **BONA FIDE PURCHASER**.

OATH. See PUBLIC OFFICER, 90.

OCCUPYING CLAIMANT.

Definition of "color of title," and "taking possession of land in good faith." *Seigneuret v. Fahey*, 60.

A taking possession is presumed to be peaceable. *Id.*

Question of good faith is for the jury. Good faith, how proved. *Id.*

In an action to redeem from a tax sale, the purchaser in possession is within the occupying-claimants' act in respect to compensation for improvements. *Goodrich v. Florer*, 97.

In an action under the statute to determine adverse claims, the defeated party, not having been in possession, is not entitled to any relief on account of having paid taxes on the property. *Dawson v. Girard Life Ins. Co.*, 411.

One in possession under an instrument which, on its face, does not appear to give him any title or right of possession, is not holding under color of title. *O'Mulcahy v. Florer*, 449.

OFFICER. See PUBLIC OFFICER; SHERIFF.

ORDER. See GARNISHMENT, 85; RECEIVER, 353.

ORDINANCE. See MUNICIPAL CORPORATION, 364.

PARTIES TO ACTIONS.

Where a court of equity, for want of jurisdiction over the principal defendant, cannot proceed to a decree against him, it will not retain the cause as against other defendants against whom the plaintiff has no cause of action, but is merely seeking relief auxiliary to that sought against the principal defendant. *Western Railroad Co. v. De Graff*, 1.

In an action against three as partners, the plaintiff, failing to connect one of them with the firm, may dismiss as to him, and have judgment against the other two. *Miles v. Wann*, 56.

A recovery may be had against one in an action against several for enticing away plaintiff's wife, though no cause of action be proved against the others. *Huot v. Wise*, 68.

A prior lienholder is not a proper party to a suit to enforce a subsequent lien, where his rights are not brought in question. *Smith v. Lytle*, 184.

Before a plaintiff can have an order making a new party defendant, and requiring him to appear and answer, the complaint must show (by amendment if necessary) a cause of action or ground of relief against such party. *Penfield v. Wheeler*, 358.

Proceedings where a party dies after verdict or decision and before judgment. *Berkey v. Judd*, 475.

PARTNERSHIP.

A father, placing his infant son in a concern as partner, *held to have*

PARTNERSHIP—Continued.

made himself, by his conduct in the business, a partner as to third persons. *Miles v. Wann*, 56.

A mortgage, by one partner, of partnership real estate standing in his name as owner, to raise money to pay firm debts, *held* within such partner's implied authority, and binding on the firm. *Chittenden v. German-American Bank*, 143.

An assignment for the benefit of creditors, executed by one partner in the absence of the other, *held* to have been authorized by the latter, and sufficiently executed and acknowledged. *Williams v. Frost*, 255.

Payment of his personal debt by one partner, with the cheque of the firm, is notice to the creditor that the funds of the firm are used in making the payment, and the *onus* is on the creditor to show the assent of the other partners to such use of the firm funds. *Davis v. Smith*, 390.

PLACE OF TRIAL.

Of appeals from justices on questions of law alone. *Chesterson v. Munson*, 498.

PLEADING. See **AMENDMENT**; **ANSWER**; **COMPLAINT**; **CONTRACT**, 320, 328, 333, 415, 428, 433; **COUNTERCLAIM**; **DAMAGES**, 428, 463; **PARTIES TO ACTIONS**; **TENDER**.

POSSESSION. See **OCCUPYING CLAIMANT**.

PRACTICE. See **AMENDMENT**; **APPEAL**; **ARBITRATION**; **ATTACHMENT**; **CASE**; **CERTIORARI**; **CHARGE OF COURT**; **CONTINUANCE**; **COUNTERCLAIM**; **ESTATES OF DECEDENTS**, 475; **EVIDENCE**, 153, 435; **EXECUTION**; **GARNISHMENT**; **INJUNCTION**; **JUDGMENT**, 478; **JURY**; **JUSTICE OF PEACE**; **MOTIONS AND ORDERS**; **NEW TRIAL**; **PARTIES TO ACTIONS**; **QUO WARRANTO**; **TRIAL**; **VERDICT**.

PRE-EMPTION. See **PUBLIC LANDS**, 218.

PRESUMPTION.

That a taking possession of land is peaceable. *Seigneuret v. Fahey*, 60.

As to mode of service of process, the record reciting a particular mode. *Morey v. Morey*, 265.

On application by the purchaser at a mortgage sale for a "final decree" vesting title in the mortgagor. *Dodge v. Allis*, 376.

In case of retention of possession by the vendor of chattels. *Molm v. Barton*, 530.

PRINCIPAL AND AGENT.

The customer of a bank *held* not an agent for the bank in procuring the usurious renewal of a note payable to himself, and which the bank held as collateral for his note, the renewal having been made at the maker's request, and the renewal note having been substituted for the original note as collateral. *First Nat. Bank v. Bentley*, 87.

PRINCIPAL AND AGENT—Continued.

Two of three associates in the enterprise of buying railroad bonds, having purchased largely on account of themselves and one S., under an agreement with S., *held* that as there was neither an agency nor a trust, the other associate could not ratify the agreement with S. and thereby recover a share of the profits of the purchases. *Farley v. Kittson*, 102.

The creditor of a partner, having drawn on him for the amount due, sent the draft to a bank for collection, to which it was paid by the cheque of the firm. *Held* that the creditor was chargeable with notice of the misuse of the partnership funds. *Davis v. Smith*, 390.

See **INSURANCE (FIRE.)**

PRINCIPAL AND SURETY.

An agreement between the creditor and the principal debtor, for extending the time for payment, though made after the debt was due, discharges the surety. The taking of the debtor's note, payable at a future day, *held* to work such an extension. *Wheaton v. Wheeler*, 464.

PROMISSORY NOTE. See NEGOTIABLE INSTRUMENT.**PUBLIC LANDS.**

A railway company, having accepted a land grant from the state, cannot object to the validity of the conditions annexed to the grant. *Western Railroad Co. v. De Graff*, 1.

Construction of acts of congress granting lands to the respective parties. *Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co.*, 128.

Character of settlement and occupancy requisite to a valid pre-emption, and to bring the settler within Sp. Laws 1862, c. 20, § 8. *Peterson v. First Division, etc., R. Co.*, 218.

PUBLIC OFFICER.

Commissioners appointed to lay out a state road, *held* to be without authority till sworn in the manner provided in the statute authorizing them to act. *State v. County of McLeod*, 90.

Mandamus will not lie for the payment of the salary and expenses of such commissioners until allowed by the county commissioners, (as provided in the act authorizing the road,) or fixed by judgment. *Id.*

One claiming and having color of title to an office, by election or appointment, and in possession thereof, exercising its functions, is the officer *de facto*, and his acts as to the public are valid, though another person may be the officer *de jure*. *Carli v. Rhener*, 292

See **CONTRACT**, 433, 458, 485; **ELECTION**; **QUO WARRANTO**, 466; **SHERIFF**.

PUBLICATION. See SUMMONS, 265.

QUO WARRANTO.

In proceedings under Gen. St. 1878, c. 63, § 1, the burden of proof is on respondent. The relator's misconduct is immaterial, if the attorney-general prosecutes the writ. *State v. Sharp*, 38.

Will not lie, without consent of the attorney-general, on the information of a private person, having no special interest in the question, to try the right of the incumbent of a public office to hold the same. *Barnum v. Gilman*, 466.

RAILWAY.

Gen. St. 1878, c. 34, §§ 54-57, requiring fences, apply to the St. Paul & Duluth R. Co. *Fleming v. St. Paul & Duluth R. Co.*, 111.

Construction of these sections. For want of a fence a cow came upon the track, a train ran over her and was ditched, and a fireman injured. *Held*, that as he continued in the employ of the company, knowing the want of fences, he assumed that with the other known risks of his employment, and cannot recover. *Id.*

An employe must make reasonable use of his senses to avoid danger and injury in the course of his employment. *Hughes v. Winona & St. Peter R. Co.*, 137.

The rule exempting a master from liability to a servant for injury from the negligence of a fellow-servant, applied to the case of a brakeman, who, in coupling cars in a yard, stepped on a pile of wet ashes, which had been dropped from a locomotive fire-box and left between the rails. *Id.*

The rule that a master is not liable to one servant for injuries caused by negligence of a fellow-servant in the same common employment, applies though the negligent servant was the superior in authority, or the overseer, of the one injured. *Brown v. Winona & St. Peter R. Co.*, 162.

Duty of railway company to use care to avoid injury to animals after they are discovered trespassing on the track. *O'Connor v. Chicago, Mil. & St. Paul Ry. Co.*, 166.

Statements made by the engineer of a train to the conductor, immediately after killing horses on the track, *held* admissible as part of the *res gestæ*. Review of cases on the subject. *Id.*

A wife travelling with her husband and being injured while stepping from the train, his statement as to how the injury occurred *held* not admissible as part of the *res gestæ*. *Keller v. St. Paul & Sioux City R. Co.*, 178.

Rule as to length of time a passenger train should stop at a station to allow passengers to alight. *Id.*

Evidence *held* insufficient to prove that a horse, found dead near a railway track, was killed by a passing train. *Jenicks v. Minn. & St. Louis Ry. Co.*, 359.

RAILWAY—Continued.

Duty of company to adjacent land-owner, and right of the latter to use his land when the railway is not fenced. Whether, in so using his land, the owner has been negligent, contributing to the injury of his cattle by a passing train, is a question of fact for the jury. It is not negligence to suffer them to graze or go to a spring on the land in broad daylight. *Schubert v. Minn. & St. Louis Ry. Co.*, 360.

Duty of servant to use care to see and avoid dangers from open and apparent defects in the instrumentalities furnished by the master, though he be ignorant of the extent of the defects. *Walsh v. St. Paul & Duluth R. Co.*, 367.

RATIFICATION. See **PRINCIPAL AND AGENT**, 102.

REAL PROPERTY. See **COLOR OF TITLE**; **MERGER**; **OCCUPYING CLAIMANTS**; **PARTNERSHIP**, 143.

RECEIPT. See **EVIDENCE**, 351.

RECEIVER.

Of specific property, in supplementary proceedings, is fully protected by the order appointing him for all acts done under it, though it be afterwards reversed because the property was exempt. *Holcombe v. Johnson*, 353.

RECITAL.

In certificate of redemption. *Willis v. Jelineck*, 18.

In judgment record. *Morey v. Morey*, 265.

REDEMPTION. See **CHATTEL MORTGAGE**, 32; **MORTGAGE**, 18, 175, 376; **TAXES**, 97.

REPLEVIN.

When, without objection, the court instructs the jury to find for plaintiff for the value of the property, the defendant cannot afterwards be heard to claim for the first time that the action is not maintainable because the property was not in his possession when it was begun. *Porter v. Chandler*, 301.

Effect of reversal, by the district court, of a justice's judgment for plaintiff, appealed from on questions of law alone. *Terryll v. Bailey*, 304.

RES ADJUDICATA. See **JUDGMENT**, 45, 70, 265, 304, 415, 428, 528.

RES GESTÆ. See **EVIDENCE**, 166, 178.

RETURN OF OFFICER. See **SHERIFF**, 269.

RIPARIAN OWNERS. See **DAMS**, 245.

RIVERS. See **DAMS**, 245.

ROAD.

An appeal from an order by town supervisors in a road matter can be taken only by one specially injured by the order, *e. g.* one to,

ROAD—Continued.

through, or along whose land the road to be altered or discontinued lies. *Schuster v. Town of Lemond*, 253.

See EMINENT DOMAIN, 119; PUBLIC OFFICER, 90.

ST. PAUL. See CITY OF ST. PAUL.

SALARY.

Of county auditor, how to be computed. *County of Mower v. Williams*, 25.

See PUBLIC OFFICER, 90.

SALE.

Failure of consideration of note given for purchase-money on a conditional sale, the machine sold having been retaken by the vendor. *Minneapolis Harvester Works v. Hally*, 495.

Presumption of fraud from retention of possession by vendor, how rebutted. *Molm v. Barton*, 530.

Of real property. See VENDOR AND PURCHASER.

See CONTRACTS, 333, 428.

SCHOOLS.

Independent school-districts may embrace one or more townships. *State v. Sharp*, 38.

Hiring of teachers by common school-districts. *Ryan v. School-District No. 13*, 433.

SHERIFF.

A redemption allowed to be made from a sheriff, under Gen. St. 1866, c. 81, § 16, may be made from a deputy in charge of his office. *Willis v. Jelineck*, 18.

An arrangement between a sheriff and his deputy that the latter shall not serve process from the district court is of no effect as regards the public. *Albrecht v. Long*, 81.

Service of affidavit by claimant of property levied on is not necessary when such claimant was in possession at the time of the levy. *Bailey v. Chandler*, 174.

Return of sheriff to a writ of attachment is conclusive on him and his legal representatives, when sued by the attaching creditor. *State v. Penner*, 269.

SPECIFIC PERFORMANCE.

Of agreement to discharge a mortgage. *Lankton v. Stewart*, 346.

STATE PRISON. See CONTRACT, 458.

STATUTE.

An act legalizing an existing road, and published in the special laws, held to be a public act. *State v. Messenger*, 119.

Authorizing service by publication must be strictly pursued to give jurisdiction. *Morey v. Morey*, 265.

Private statutes, how to be pleaded in indictments. *State v. Loomis*, 521.

STATUTE OF FRAUDS.

Action to recover back a part-payment of purchase-money on verbal contract for sale of lands. *Sennett v. Shehan*, 328.

STATUTE OF LIMITATIONS. See TAXES, 259, 449.

STATUTES CITED, CONSTRUED, ETC.

U. S. STATUTES AT LARGE.

Vol. 5, p. 453, Pre-emption Law, Vol. 11, p. 195, Land Grant Act, 131
222 Vol. 13, p. 526, " " " 131

PUBLIC STATUTES, (1849-1858.)

c. 61, § 22, Charge to Jury, 248.

GENERAL STATUTES, (1866.)

c. 11, §§ 78-80, Taxes,	65	c. 69, §§ 1, 4, Antenuptial Con-	
—, §§ 118-122, Taxes,	261	tracts,	297
—, §§ 142, 155, Taxes,	94	c. 81, §§ 13, 16, Redemption	
c. 23, § 1, Usury,	133	from Foreclosure,	19
c. 48, §§ 14-17, Antenuptial		—, §§ 14, 15, Redemption	
Contracts,	297	from Foreclosure,	23

GENERAL STATUTES, (1878.)

c. 1, §§ 14, 19, 48, Elections,	472	c. 40, §§ 21, 36, 37, Notice of	
c. 10, § 113, Towns,	43	Record,	398
c. 11, § 5, Exemption from Tax-		c. 41, §§ 15, 20, Fraudulent	
ation,	461, 505	Sales,	533
—, §§ 70, 73, 79, Taxes,	110	—, § 23, Assignments for	
—, § 85, Tax Sales,	450	Creditors,	259
—, §§ 90-92, Taxes,	99	c. 46, §§ 2, 3, Descent of Real	
c. 13, § 59, Roads,	254	Property,	298
—, §§ 53-55, Roads,	124	—, § 3, Debts of Decedents,	414
—, §§ 65, 66, Obstructing		c. 51, § 1, Distribution of Per-	
Roads,	16	sonal Estate,	299
c. 16, §§ 1, 4, Sale of Liquors,	318	c. 53, § 16, Actions against De-	
—, § 10, Selling Liquor to		cedents,	477
Minors,	154	c. 62, § 6, subd. 5, Divorce,	330
c. 23, Usury,	87	c. 63, § 1, Quo Warranto,	39
c. 34, §§ 54-57, Fencing Rail-		c. 64, §§ 104, 105, 108, Justices	
ways,	113, 360	of St. Paul,	238
—, §§ 92-98, Railway Aid		—, § 133, Municipal Judge,	
Bonds,	227	Stillwater,	293
c. 36, §§ 17, 115, School-Dis-		c. 65, §§ 91, 95, 96, Replevin,	306
tricts,	41	—, § 116, Appeals from Jus-	
—, § 94, School-Districts,	40	tices,	501
c. 39, § 8, Chattel Mortgages,	34	—, § 117, Appeals from Jus-	
—, § 14, Chattel Mortgages,	310	tices,	30
—, §§ 21, 22, Note for Sow-		—, § 123, Appeals from Jus-	
ing-Seed,	387	tices,	501

GENERAL STATUTES, (1878.)—Continued.

c. 65, §§ 140, 141, Justices of the Peace,	16	c. 75, § 15, Occupying Claimants,	101, 452
c. 66, § 51, subd. 4, Change of Venue,	501	—, §§ 15 - 24, Occupying Claimants,	62
—, § 82, Computation of Time,	202	—, § 16, Occupying Claimants,	453
—, §§ 120-125, Amendments,	483	—, § 44, Nuisances,	249
—, §§ 145-149, Attachment,	275	c. 79, Quo Warranto,	39
—, § 151, subd. 3, Attachment,	534	c. 81, § 29, Judgment in Foreclosure,	381
—, § 159, Attachment,	275	—, § 36, Final Decree in Foreclosure,	380
—, § 183, Garnishment,	34	c. 82, § 2, Judgment by Confession,	482
—, § 214, Trial,	30	—, § 3, Judgment by Confession,	481
—, § 217, Trial by Jury,	314	c. 84, Unlawful Detainer,	238
—, § 244, Special Terms,	238	c. 86, § 8, Appeals,	109, 144
—, § 253, New Trials,	144, 423	c. 89, § 3, Arbitrators,	404
—, § 255, Statement of Case,	402	c. 90, § 1, Mechanic's Lien,	518
—, § 266, Joint Defendants,	59	—, §§ 3, 4, " "	435
—, § 274, Actions against Decedents,	477	—, § 7, " "	517
—, § 301, Levy,	276	—, § 8, " "	314
—, § 310, Exemption from Execution,	135, 508	c. 96, § 1, Forgery,	316
—, § 315, Levy on Grain,	529	—, § 10, Intent to Defraud,	311
c. 67, § 14, Costs,	30	c. 100, § 6, Seduction,	53
c. 68, § 1, Homestead Exemption,	407	c. 107, § 41, Witnesses,	283
—, §§ 1, 8, Homestead Exemption,	117	c. 108, § 8, Indictment,	311
—, §§ 3, 4, 8, Homestead Exemption,	160	—, § 13, Pleading Private Statute,	526
—, §§ 8, 9, Homestead Exemption,	407	c. 111, § 11, Demurrer in Criminal Cases,	525
c. 69, § 5, Desertion,	330	c. 117, § 11, Criminal Trials,	524
c. 73, §§ 7, 9, Witnesses,	436	c. 124, §§ 7-16, Storage of Wheat,	527
—, § 10, Husband and Wife,	69	—, § 17, Warehouse Receipts,	528
c. 75, § 2, Adverse Claims,	93		

SESSION LAWS, (GENERAL.)

1860, c. 1, § 99, Sale for Taxes,	453	1879, c. 17, § 1, Contract by School-District,	434
1871, c. 90, Auditor's Salary,	25	—, § 2, Common-School Teachers,	434
1872, c. 25, § 4, Railroad Fences,	113	—, c. 65, § 2, Chattel Mortgages,	373
1874, c. 67, Unlawful Detainer,	238		
1875, c. 5, § 30, Tax Sales,	450		
1877, c. 121, Redemption from Foreclosure,	20		

SESSION LAWS, (SPECIAL.)

1862, c. 20, § 8, Pre-emptions of Railroad Land,	218	1875, c. 132, Aid to Railroads,	200, 201, 492
1874, c. 1, §§ 25, 26, 39, 54, St. Paul—Assessments,	444, 445	1877, c. 201, St. Paul & Pac. R. Co. Extension,	8
—, —, subch. 4, § 3, subd. 11, St. Paul—Hacks,	365	1878, c. 25, subch. 10, §§ 9, 10, Minneapolis, Assessments,	511
—, —, subch. 7, § 60, St. Paul—Reassessment,	79	—, —, —, § 11, Minneapolis, Assessments,	515
—, c. 7, Winnebago City,	77	—, c. 150, Lake Phalen,	14
—, c. 59, Railroad Bonds,	200	—, c. 191, Legalizing Road,	121
1875, c. 1, St. Paul, Assessments,	444	1879, c. 236, Moorhead,	40
—, —, §§ 16, 17, St. Paul, Reassessment,	80	—, c. 248, State Road,	90

STAY OF PROCEEDINGS. See APPEAL, 250.

STIPULATION. See CASE, 401.

STREET. See MUNICIPAL CORPORATION, 243, 457.

SUMMONS.

Statutes authorizing service by publication must be strictly pursued to give jurisdiction. *Morey v. Morey*, 265.

SUPPLEMENTARY PROCEEDINGS. See RECEIVER, 353.

SURETY. See PRINCIPAL AND SURETY.

SURPRISE. See NEW TRIAL, 357.

TAXES.

County treasurer's receipts are evidence to show by whom taxes on land have been paid. *Seigneuret v. Fahey*, 60.

Limitation of power of county to incur pecuniary liability involving a tax exceeding 10 mills on the dollar of the taxable property of the county. *Held* (1) that a contract requiring the issue of county orders is the incurring of a "pecuniary liability." (2) That the rate of taxation is to be estimated on the valuation shown by the grand list subsisting when the contract was made. *Johnston v. County of Becker*, 64.

A purchaser at a tax sale has no lien where the sale proves invalid by reason of an illegal assessment or levy. *Barber v. Evans*, 92.

An action to redeem from a tax sale is an action to establish the right of, as well as to effect, a redemption. *Goodrich v. Florer*, 97.

In such action the judgment must declare what may be redeemed and what shall be paid. *Id.*

A person under disability (*e. g.* an insane person) has a right to redeem during the period of disability. *Id.*

TAXES—Continued.

A person can redeem only the estate or interest he actually owns. *Id.*
 In an action to redeem, the purchaser in possession is within the occupying-claimants' act in respect to compensation for improvements. *Id.*

An order setting aside a tax judgment on grounds of strict legal right, and not on a question of practice or discretion, is appealable.
County of Chicago v. St. Paul & Duluth R. Co., 109.

A tax judgment rendered against land which is exempt from taxation is not therefore void for want of jurisdiction. *Id.*

No class of persons but the electors of towns and the officers chosen by them can determine the action of the town on questions (*a. g.* the issue of bonds in aid of railways) involving local taxation. *Harrington v. Town of Plainview*, 224.

Laws 1877, c. 106, § 7, (Gen. St. 1878, c. 34, § 98,) *held* unconstitutional because it assumes to vest this power in a majority of the resident tax-payers, whether electors or not. *Id.*

A tax deed, under Gen. St. 1866, c. 11, § 139, to be *prima facie* evidence of title, must show on its face that the sale was for taxes due, delinquent and unpaid. *Sheehy v. Hinds*, 259.

A delinquent tax sale, under Gen. St. 1866, c. 11, begun on another day than that named in the notice of sale, is void. *Id.*

The three years' limitation in Gen. St. 1866, c. 11, § 154, has no application to a claim under a tax deed that is void on its face. *Id.*

In an action under the statute to determine adverse claims, the defeated party, not having been in possession, is not entitled to any relief on account of having paid taxes on the property. *Dawson v. Girard Life Ins. Co.*, 411.

The limitation in the tax law of 1878 (Gen. St. 1878, c. 11, § 85,) does not apply to tax sales under the law of 1875. *O'Mulcahy v. Florer*, 449.

A tax deed *held* not regular on its face, because not showing authority in the county treasurer to make the sale. *Id.*

And therefore the person in possession under such deed does not hold under color of title. *Id.*

A certain hospital *held* to be an institution of purely public charity, and as such exempt from taxation, together with adjacent land used as a vegetable garden, wood-yard, etc., for the use of the hospital.
County of Hennepin v. Brotherhood of Gethsemane, 460.

A parochial school *held* exempt from taxation as a charity. *County of Hennepin v. Grace*, 503.

But a parsonage *held* not exempt. *Id.*

TENDER.

On an absolute refusal by a creditor to accept an offer of payment, though informed that the debtor has the money with him, the latter, under a plea of tender, may prove that he had the money with him ready to pay. *Pinney v. Jorgenson*, 26.

TENDER—Continued.

Where a note, besides promising a sum stated, also contains a promise to pay an additional sum for expenses in case it is sued, this additional sum cannot be recovered if the amount due on the note was tendered before suit brought, though the tender was not kept good, there having been no subsequent demand. *Id.*

TIME.

A notice posted on May 13, for a meeting on May 23, is posted "at least 10 days prior" to such meeting. *Coe v. Caledonia & Miss. Ry. Co.*, 197. Compare *Grove v. St. Paul, S. & T. F. R. Co.*, 25 Minn. 327.

TITLE. See **COLOR OF TITLE.**

TOWN. See **MUNICIPAL CORPORATION**, 197, 224, 490; **ROAD**, 263; **TAXES**, 224.

TRESPASS. See **DAMAGES**, 463.

TRIAL.

Effect of objection to evidence "same as above." *State v. Hyde*, 153.

Proper practice where court errs in stating evidence. *O'Connor v. Chicago, Mil. & St. Paul Ry. Co.*, 166.

Proper practice where the judge expresses an opinion on a question of fact. *Ames v. Cannon River Mfg. Co.*, 245.

Judgment ordered where the special findings covered all the issues, though there was no general verdict. *Bixby v. Wilkinson*, 262.

In a replevin suit, the court having directed a verdict for plaintiff, *held* that defendant could not afterwards be heard to claim for the first time that the action would not lie because he had not possession of the property when it was brought. *Porter v. Chandler*, 301.

Error in refusing to dismiss *held* cured by subsequent introduction of evidence. *Deakin v. Chicago, Mil. & St. Paul Ry. Co.*, 303.

In a suit to enforce a mechanic's lien, the defendant has no right to a jury trial. *Sumner v. Jones*, 312.

What degree of understanding is requisite to make a person competent as a witness, and how the competency is to be determined. *Canady v. Lynch*, 435.

Application of the rule requiring objections to evidence to be definitely stated. *Id.*

See **NEW TRIAL**.

TROVER. See **CONVERSION**.

TRUST.

A trustee, under a will, to receive and apply to the use of the beneficiary the rents and profits of land, *held* not authorized to sell, no power of sale being given in the will. *Officer v. Simpson*, 147.

See **PRINCIPAL AND AGENT**, 102.

ULTRA VIRES. See COUNTIES, 64; MUNICIPAL CORPORATION, 197, 224, 490.

UNITED STATES COURTS. See ESTATES OF DECEDENTS, 70.

UNITED STATES LANDS. See PUBLIC LANDS.

UNLAWFUL DETAINER. See JUSTICE OF PEACE, 236.

USURY. See INTEREST; PRINCIPAL AND AGENT, 87.

VALUE. See EVIDENCE, 49, 284, 301, 431.

VENDOR AND PURCHASER.

A sale of the fee of land on execution against one having only an equitable interest under a contract of purchase, *held* void as against the vendor owning the legal title, and having a lien for the unpaid purchase-money. *Smith v. Lytle*, 184.

Requisites to right of purchaser to recover back a part-payment of purchase-money on an oral contract of sale. *Sennett v. Shehan*, 328.

Specific performance decreed of an agreement between a mortgagee and a purchaser for the discharge of the mortgage. *Lankton v. Stewart*, 346.

A vendor's lien does not prevail against a creditor of the purchaser whose claim accrued subsequently to the lien, and without notice of it. *Dawson v. Girard Life Ins. Co.*, 411.

For sales of personalty. See CONTRACTS, 333, 428; SALE.

VERDICT.

Cannot be impeached by affidavits of jurors showing mistake. *Stevens v. Montgomery*, 108.

General verdict unnecessary, where the special findings cover all the issues. *Bixby v. Wilkinson*, 262.

On an issue in probate proceedings, on appeal to the district court, is as binding and subject to the same rules as to setting it aside, as any other verdict. *Pinney's Will*, 280.

Finding a chattel mortgage fraudulent as to creditors, *held* justified by the evidence. *Solbery v. Peterson*, 431.

Sustaining the validity of a sale impeached for fraud on creditors, *held* properly set aside as against evidence. *Campbell v. Landberg*, 454.

In trespass, for damages not pleaded. *Isaacson v. Minn. & St. Louis Ry. Co.*, 463.

VOLUNTARY PAYMENT. See INTEREST, 132; TAXES, 411.

WAIVER.

Of condition in fire-insurance policy. *Brandup v. St. Paul F. & M. Ins. Co.*, 393.

Of the objection that a bridge constructed by the defendant was not of the kind called for by his contract with plaintiff, if relied on by defendant, must be pleaded. *City of Winona v. Minn. Ry. Const. Co.* 415.

WAIVER—Continued.

By contractor, of omission or delay in furnishing estimates. *Hooper v. Webb*, 485.

Of objection that an appeal from a justice is brought on for hearing in the wrong county. *Chesterson v. Munson*, 498.

Of technical objections to depositions. *Molm v. Barton*, 530.

WARRANTY. See **CONTRACT**, 428.

WATERCOURSE. See **DAM**, 245.

WILL.

Rulings as to the degree of capacity requisite in a testator, and the competency of evidence on that point. *Pinney's Will*, 280.

A mistake in the description of devised property disregarded. *Butler v. First Presbyterian Church*, 355.

See **TRUST**, 147.

WITNESS. See **EVIDENCE**, 60, 68, 280, 435.

WORDS.

"Accountable receipt," as the subject of forgery. *State v. Riels*, 315.

"Adultery," as ground for divorce. *Pickett v. Pickett*, 299.

"Amount in controversy," as limiting the jurisdiction of justices of the peace. *Watson v. Ward*, 29.

"At least 10 days," in a statute requiring notice of an election. *Coe v. Caledonia and Miss. Ry. Co.*, 197.

"Color of title" and "taking possession of land in good faith," as used in the occupying claimants' act. *Seigneuret v. Fahay*, 60; and see *O'Mulcahy v. Florer*, 449.

"De facto officer." *Carli v. Rhener*, 292.

"Filed," in the registry of deeds. *Willis v. Jelineck*, 18.

"Ordinary stage of water," in a river. *Ames v. Cannon River Mfg. Co.*, 245.

"Pecuniary liability," in statute limiting taxing power of counties. *Johnston v. County of Becker*, 64.

"Previous chaste character," in statute punishing seduction. *State v. Gates*, 52.

"Settlement" requisite to a pre-emption. *Peterson v. First Dis., etc., R. Co.*, 218.

"Value received," in a contract other than a note. *Frank v. Irgens*, 43.

Ex. J. A. A.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS.

4997 003

